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ARGUED AND DETERMINED IN THE
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By NORMAN L. FREEMAN,
REPORTER.

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PROCEEDINGS
UPON THE
DEATH OF NEHEMIAH BUSHNELL,
HAD IN
THE SUPREME COURT OF ILLINOIS,
AT THE
JANUARY TERM, 1873, AT SPRINGFIELD.

The Honorable NEHEMIAH BUSHNELL departed this life on the 31st day of January, 1873, at his home in Quincy, in this State. During the January Term, 1873, of the Supreme Court, held at the capital, the members of the Bar in attendance, together with many of the executive, legislative and judicial officers of the State, met for the purpose of testifying their respect and affection for the deceased.

On the 13th day of February, 1873 the Supreme Court was in session, the full Bench present: CHARLES B. LAWRENCE, Chief Justice, PINKNEY H. WALKER, SIDNEY BREESE, JOHN M. SCOTT, WILLIAM K. McALLISTER, ANTHONY THORNTON and BENJAMIN R. SHELDON, Justices, when the Hon. JOHN A. McCLEARNAND, in behalf of the friends of the late Mr. Bushnell, presented the resolutions adopted at that meeting.

Judge McCLEARNAND addressed the court as follows:

May it please the Court:

The sad, yet pleasing duty has devolved upon me to present to your Honors, the proceedings of a meeting variously composed of Executive, Legislative and Judicial officers, and of the members of the Bar of this Honorable Court. The subject of these proceedings is the sudden and unexpected death of Honorable Nehemiah Bushnell, late a member of the General Assembly and of the Bar of this Court, whose mortal career was cut short in the meridian of his life, and at a time when he was entering

upon a fresh field of the public service, in which his acknowledged abilities, diligence and integrity would have served to have signalized his usefulness as a legislator. The purpose of these proceedings was to afford a fitting testimonial of the affection and respect borne by his professional brethren, and other friends and admirers, to his cherished memory. This testimonial is exhibited in the proceedings which I now have the honor to present, and to ask your Honors to cause to be spread upon the records of the Court.

These were the resolutions:

WHEREAS, It has pleased the Almighty, in the order of his Providence, to take from this life our respected brother, Honorable Nehemiah Bushnell, an honest man, an accomplished gentleman, and a diligent, faithful and successful lawyer; and

WHEREAS, This sad event has stricken the wide circle of his numerous acquaintances, friends and admirers, in private, professional and public life, with a profound and abiding sense of grief; therefore we, as Judges, and as surviving members of the Bar of Illinois, feeling it our sorrowful yet pleasing duty to record, in some enduring form, our affection, respect and reverence for the lamented dead, and our sympathy with his widow and kindred in their bereavement, have

Resolved, First, That by the death of the Honorable Nehemiah Bushnell, the Bar of the State of Illinois has lost one of its most eminent and distinguished members; one who, by his patient industry and varied learning, had reached the highest honors of the legal profession; while his intellectual powers, his spotless character, and his long life of ceaseless activity, have rendered him a shining example to those who remain, and an ornament to the State in whose councils he was deservedly prominent.

Second, That we tender to his afflicted widow our heartfelt sympathy in the hour of this her deepest sorrow.

Third, That a copy of these resolutions be presented to the Supreme Court of this State, and to the Circuit and District Courts of the United States for the Southern District of Illinois, with the request that they be spread upon the records; and that the clerks of said Courts transmit a copy thereof to the widow of the deceased.

Upon the reading of the resolutions, JACKSON GRIMSHAW, Esq., of Quincy, addressed the court. Mr. Grimshaw paid a very feeling and impressive tribute to the worth of the deceased, as a lawyer, a scholar and a man.

The Hon. BENJAMIN S. EDWARDS, of the Springfield Bar, followed, recalling the scenes and occurrences of former years, his early acquaintance with Mr. Bushnell, who, with many of the older heroes of the Bar, had thus passed away.

Mr. WILLIAM A. TURNER, who has been for eighteen years clerk of the Supreme Court, asked leave to add to the proceedings his testimonial to the exalted worth, deep and accurate learning, candor and urbanity of Mr. Bushnell, and especially to express his grateful remembrance of the kindness and generous advice which he had received at the hands of that truly good man and wise counsellor.

Mr. CHIEF JUSTICE LAWRENCE, in behalf of the court, having directed the resolutions to be spread upon the records, made the following response:

The death of Mr. BUSHNELL, in honor of whose memory these resolutions have been presented, is considered by the members of this court as

well as by the gentlemen of the Bar, an event over which our profession and the State at large have reason to mourn. To all the occupants of this Bench he had long been known—to some of us, so intimately that his death comes home to us, not only as a public calamity, but with the bitterness of personal bereavement. For myself, I may be permitted to say, that my professional life in this State began nearly thirty years ago, in the same city where Mr. Bushnell was already established among the leaders of the Bar; and from that time until his death, I esteemed it a privilege to be able to count him among my personal friends. A few years before my acquaintance with him commenced, he had left New England to seek a home in Illinois. Visiting Quincy, he called at the office of a gentleman, who, though still young, was well known throughout the State as standing in the foremost rank of the profession. An hour's conversation disclosed to him the worth of the new-comer, and with the frank generosity of the time and country, he offered to this stranger an equal partnership in his practice. The offer was gratefully accepted, and the partnership thus begun, upon terms which were never reduced to writing, continued unclouded by a difference for over thirty-five years, and until it was closed by death—leaving the senior member of the firm to mourn with the grief of a brother, the loss of one whose great virtues he had so long known and loved.

Mr. Bushnell was endowed by nature with that kind of intellect which especially fits its possessor for distinction at the Bar. His mind was eminently analytical, with rare powers for discerning resemblances and differences. To this he united the faculty of surveying a subject in what Bacon called the "dry light" of pure reason, undisturbed by passion or prejudice. His logical power was of the highest order, and he had a quickness and fertility of intellectual resource that made him a dangerous antagonist, even in a losing cause, and an almost certain victor when right was upon his side. His fine faculties had been thoroughly trained, and his habits of patient study went almost to excess. To this intellectual equipment, he united a natural moral rectitude, which, though there have been great lawyers without it, great by the sheer force of intellect, must nevertheless be regarded as the truest basis for eminence in a science which deals with the distinctions between right and wrong, and whose sole object is the administration of justice in all the complex relations of human life. Besides all this, he had a strong bent for historical, and even antiquarian, research, that led him back with enjoyment to the earliest oracles of the common law. With this mental constitution there were two branches of our science in which he would naturally be pre-eminent. His cultivated conscience made him find pleasure in the refined justice which courts of equity administer, while, on the other hand, the law of real estate, venerable by its age, exact in its details, and symmetrical in its completeness as a system, presented a field of labor in which he was singularly fitted to take high rank. In these two branches of the law, I think he had no superior at the Bar of this State.

But our departed brother was not merely a distinguished lawyer. He was a scholar of wide and various learning. His love of books was almost

a passion, and he has left a library which is probably the finest private collection in the State. His historical reading was singularly extensive, and his historical knowledge exact as well as comprehensive. The annalists of Greece and Rome, the quaint chroniclers of the middle ages, and the philosophic historians of Germany, England, and our own country, were his familiar studies. The career and character of the elder Napoleon had a singular fascination for him, and he was more minutely acquainted with European history, from the outbreak of the French revolution down to the battle of Waterloo, than any person I have ever known. He had made of that period a special study, and its multitudinous events, the marches and battles of its armies, the intrigues of its diplomatists, and the policies of its statesmen, were as familiar to him as are the events of to-day to the reader of a daily newspaper.

He was also a lover of the literature of the imagination. I think he had no special admiration for the living poets, but he read, with fond appreciation, the earlier masters of English song. I have often found him, after a day of severe labor in the courts, refreshing his exhausted spirits in the pages of some old poet. He could enjoy Chaucer's rugged verse, and the Faëry Queen of Spenser gave him such pleasure as boys find in Robinson Crusoe and the Tales of the Arabian Nights. But his taste was catholic, and he took delight not only in the grand old poets and dramatists of the Elizabethan age, but in the stately prose of Bacon and Hooker, while both the prose and poetry of Milton had for him an especial charm.

But it is not as lawyer or scholar that Mr. Bushnell is to be chiefly mourned and honored, but as a man. His face, when in repose, wore an expression of gravity bordering upon sternness, that might have come from his puritan ancestry; but in conversation, his features lighted up with an expression singularly attractive. The face was the type of the man. He looked at life on its serious side, and uncompromising integrity and truthfulness made the foundation of his character. He sought to do his duty, and in doing it, would show, if necessary, the highest moral intrepidity. But while he thus stood among men, "without fear and without reproach," strong in all the fibres of his nature, he was, nevertheless, in his intercourse with others, as simple and unpretending as a child. The gravity of his character had nothing of the austere. He was eminently genial with those he knew well, and a vein of subtle and quaint humor ran through his familiar conversation.

A sad illustration occurs to me as I write. I called at his room a few evenings before he went home to die. After passing an hour in pleasant talk of former days, I rose to leave, remarking that he had a winter of hard work before him in the Legislature, but he would learn practically how laws were made. "Yes," he laughingly replied, "as Gibbon said he learned from three month's drill in the Hampshire militia how to describe the battles in his history of the Decline and Fall of Rome."

He loved a pleasant jest or odd conceit. Overflowing with information, he never dogmatized or manifested any consciousness of superiority. A

rigid moralist, and inflexible in the rules of his own conduct, he was a lenient interpreter of the acts of others, and ever ready to forgive a wrong. In manners and bearing, he had none of the artificial polish which is sometimes caught from a wide intercourse with the world, but he possessed a native dignity of deportment that always commanded respect, and a kindliness of nature that inspired attachment. He was always and everywhere a gentleman, and a gentleman by the grace of nature.

He united a thorough self-respect with a thorough respect for others. Under his calm exterior beat a heart full to overflowing with sympathetic kindness, and his hand was "open as the day to melting charity." He was incapable of injustice, and his mind was the home of high thoughts and noble sentiments. While he cherished an honorable professional ambition, he avoided political life, from an unconquerable dislike of the methods by which political success is commonly achieved; and only at the close of his career, was he forced, by the spontaneous demand of the people, to accept a seat in the General Assembly. There he devoted himself to his duties with his accustomed energy, but in a brief period his overtaken frame gave way, and the curtain fell. He has gone, in the prime of his manhood, but he has lived a noble and well-rounded life. His memory will be cherished by his brethren of the Bar, as that of one whose career has honored the profession. He sleeps beneath the trees he loved so well, upon the border of our great river, among a people who will long visit his grave with reverence, and who will hand down his name to their children as that of a man of noble endowment, of high attainment, and of a character free from all vice, and fragrant with the sweetness of every virtue.

At the conclusion of the address of the Chief Justice, the Court adjourned.

CASES
IN THE
SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1870.

DENNIS BEACH

v.

CALVIN SHAW.

57	17
132	303
57	17
132	470
156	63
57	17
134	36
57	17
138	307

1. **DEED OF TRUST—*sale under, by agent.*** Notwithstanding an agent appointed by a trustee, with a power to sell the trust property, can not legally sell it in the absence of the trustee, still, a person holding simply the legal title, without having any equitable interest whatever in the trust property, can not in equity question such a sale.

2. **DEED OF TRUST—*mortgage—judgment and sale.*** Where a person held real estate, and mortgaged it to secure a debt he owed, then sold the property, subject to the mortgage, and a third person recovered a judgment against the purchaser, and had an execution thereon, and subsequently the purchaser executed a mortgage to another person, and afterwards made an assignment of the mortgaged premises with other real estate to a trustee for the benefit of his creditors, and a few days afterwards the sheriff sold

2—57TH ILL.

Syllabus.

the property under the execution in his hands, when the trustee holding for the benefit of creditors, had the land bid in by and in the name of his clerk, but the trustee, out of the trust fund in his hands, paid the bid to the sheriff by his clerk, and charged it in his account of the trust fund, and the clerk paid nothing on the purchase, but he, some eleven years afterwards, procured a sheriff's deed for the property : *Held*, that he acquired no equity to or in the property by his sheriff's deed, and had no right to question an irregular sale under a prior mortgage.

3. **MORTGAGE—prior lien—sale under.** Where a prior mortgage falls due, and the property is sold by a trustee under a power in the deed, and a junior mortgagee becomes the purchaser at such sale, pays the money and enters into possession of the property and continues the possession : *Held*, such a person will not be disturbed by a person clothed merely with a naked legal title, but having no equitable rights ; nor can such person redeem from the sale under the mortgage.

4. **JUDGMENT—satisfaction.** Where the assignee bid in the trust property in the name of his clerk, and paid the sheriff the amount of the judgment out of the trust funds in his hands, that operated simply as a satisfaction of the judgment, and let in the junior incumbrance next in rank to the first mortgage on the property, and if the purchaser from the first mortgagor, were to be allowed to redeem, he would be required to pay not only the bid by the second mortgagee under the sale on the first mortgage, but the amount of the second mortgage to him.

5. **EQUITY—relief given or refused.** A court of equity gives or withholds its remedies according to the equities of the case. A suitor must not only come to the court with clean hands, but he must come as well with rights in the subject matter entitling him to equitable relief. The court will not disturb rights of others on the application of one who has no equitable interest. In administering equitable relief, the court looks through forms to the substance of transactions.

6. **SAME—right to relief.** As a general rule, the holder of the legal estate under the mortgagor is a proper person to redeem, whether he holds as trustee for others or in his own right by a voluntary conveyance from the mortgagor, but when such grantee asks something more than the mere right to redeem, as to set aside a sale previously made under the mortgage, on the ground of irregularity in conducting it, but which was fair, and at which a third party became a purchaser in good faith, and the sum paid with his own incumbrance exceeded the value of the property, such holder of the legal title must show that he has equities before he can redeem.

7. **SAME—relief, to whom.** It is conceded that the grantee of the mortgagor, whether claiming as trustee for others or in his own right, and whether a purchaser for value or a mere volunteer, has the same right to set aside such a sale as the mortgagor himself, but a court of equity would not set

Syllabus. Opinion of the Court.

it aside for the benefit of one who has acquired the naked legal title as a mere formal purchaser, paying nothing, not expected by others to acquire any benefit, or intending himself to do so at the sale.

8. **ALLEGATIONS AND PROOFS**—*parties*. Where the holder of the legal title is the trustee, and he claims the right to redeem and set aside sales in the way of his title, he should frame his bill with that view, and not claim by his bill to do so in his own right and for his own benefit. Having claimed in the bill relief for his own benefit, he can not urge that the proceedings are for the benefit of others. Relief must be granted according to the frame and prayer of the bill, and if seeking to redeem for others he should make them co-complainants, and have all persons in interest before the court.

9. **REDEMPTION**—*who have the right*. In such a case, the mortgagor, his assignee or the creditors through the trustees, are the only persons who can claim the right to redeem, and they are not seeking the right in this case. Until they complain the court will not decree a redemption or set aside the sale, at the solicitation of a person having no equitable rights.

APPEAL from the Superior Court of Chicago.

Messrs. DENT & BLACK, for the appellant.

Mr. W. T. BURGESS, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

On the 15th day of April, 1855, Thomas B. Bryan, being then the owner of the north half of lot 4, block 15, Fort Dearborn addition to Chicago, mortgaged the premises to one Wylie, to secure four notes, executed by Bryan to him, amounting to \$5,600.00.

On the 25th of March, 1856, Bryan sold and conveyed the property to Reed and Watkins, subject to said mortgage, and, by an express provision of the deed, which was executed as well by the grantees as by Bryan, they undertook the payment of the mortgage. In September, 1856, Reed conveyed his interest in the lot to Watkins. In February, 1857, Prince recovered a judgment in the Cook county court of common pleas,

Opinion of the Court.

against Reed and Watkins, for \$1,522.72, and execution issued in May, 1857. In July, 1857, Watkins executed a mortgage on the premises to Beach, the appellant, to secure two notes, one for \$4,000 and the other for \$2,500, given for borrowed money. The order of the respective liens was, first, the mortgage to Wylie; second, the judgment against Reed and Watkins, and third, the mortgage to Beach. On the 6th of August, 1857, Watkins made a general assignment of his property, including this lot, to Daniels, for the benefit of certain of his creditors, not including Beach, and on the 28th of the same month, the sheriff sold under an execution, issued on the Prince judgment, the premises in controversy, and also three other lots in the city of Chicago. All the property was struck off in the name of Shaw, the appellee herein and complainant below, but he was only a nominal purchaser. The money was paid by the assignee, Daniels, out of the trust funds. Shaw was acting at the time as Daniels' clerk. The payment was entered at the date in the account kept by Daniels as assignee, upon his books. The return of the sheriff upon the execution does not show a sale of each lot separately, but merely that all the lots sold for \$1,653.78, which satisfied the execution. Neither does the sheriff's deed, which was not made until June 29, 1868, and was then made to Shaw, show what was bid upon this lot.

One of the notes secured by the mortgage from Bryan to Wylie, fell due on the 15th of April, 1858, and was not paid by Reed and Watkins, who had undertaken its payment. Wylie lived in the city of Washington and had assigned the note to Withers, a banker of the same city. Bryan, being the maker of the note, in order to preserve his credit, and not, as he testifies, to discharge the note, sent on the necessary funds to Wylie to redeem it from Withers, and had Wylie send it back to Mather & Taft, attorneys in Chicago, for the purpose of enforcing payment through the mortgage.

Bryan had an undoubted right to cause this to be done, and did not, by advancing the money to Wylie for the redemption of the note, discharge the lien of the mortgage, as between

Opinion of the Court.

himself and Watkins or Watkins' assignee, since, by the express terms of the deed from Bryan to Reed and Watkins, the lot was made the primary fund for the payment of the debt, and its payment was expressly assumed by Reed and Watkins. The mortgage contained a power of sale, and Mather, acting under a power of attorney from Wylie, proceeded, after due advertisement, to make the sale on the 19th of July, 1858, to pay the note which was past due, and also that which would mature the next year. This was in accordance with the terms of the mortgage in case of default and sale. The amount estimated to be due on the mortgage was \$4,640, and the premises were bought at the sale by Beach, who held the junior mortgage, at that price. He paid the \$4,640, received a deed from Wylie, and at once entered into possession of the premises and has remained in possession to the present time.

On the 6th of June, 1868, Shaw, claiming to be the owner of the mortgaged premises as purchaser under the Prince judgment and execution, filed a bill against Beach to redeem, and on the final hearing a decree was pronounced authorizing a redemption, charging Beach with rents and profits towards the payment of his bid, allowing him nothing upon the mortgage from Watkins to him, and requiring him to convey to Shaw his title acquired under the Wylie sale, on the receipt of the balance found to be his due. From this decree Beach prosecuted an appeal.

The chief, and indeed, upon the evidence, the only ground for attacking the sale to Beach, is, that it was made by an attorney, and in the absence of the donee of the power, which this court held in *Taylor v. Hopkins*, 40 Ill. 442, could not be legally done. Admitting the sale could have been avoided by a proceeding instituted in due time, and by the proper parties, the question is, whether the complainant in this record occupies a position entitling him to call it in question.

The error running through the argument of counsel for appellee, consists in the assumption that the complainant, Shaw, was really a purchaser at the sheriff's sale. He was not a

Opinion of the Court.

purchaser in any just sense, not in such a sense as to give him the slightest equitable right or interest in the property. He was a purchaser only in name. Although this and the other lots were struck off in his name, and the sum of \$1,653.78 was paid upon the bid, not a dollar of it was paid by him. That sum, it is conceded, was paid by Daniels as assignee of Watkins, the judgment debtor, with money received from the property assigned to him by Watkins. As already stated, Shaw was Daniels' clerk. Why Daniels, through Shaw, bid in the property and paid the money does not appear, but the presumption is, that he regarded the property levied upon as worth more than the amount of the judgment, and that he supposed he would, in the end, be increasing the funds in his hands by bidding in the property and paying the judgment from the trust funds. Whatever may have been his motive, that is what he actually did, and as he testifies that he subsequently closed up the assignment, the presumption is that his course was satisfactory both to Watkins and to the creditors. What finally became of the other three lots sold by the sheriff, this record does not disclose, but we suppose, when these premises were subsequently sold under the Wylie mortgage, to pay a debt amounting to \$4,640.00, which was the oldest lien, and which was not provided for in the deed of assignment, the assignee gave himself no further uneasiness in relation to this property. This also explains why no deed was ever taken out upon the sheriff's certificate of purchase until about ten years after it might have been demanded, and no claim was made against Beach, for the property. Shaw then appears, files his bill to redeem, procures a deed from the sheriff, asks that the rents of the property be applied towards the extinguishment of Beach's claim as a purchaser under the Wylie sale, that the title derived under that sale be conveyed to him, that Beach be cut off from all benefit of his own mortgage for a large amount of money loaned Watkins, and that Shaw himself be decreed to be the owner of the property in his own right, though he has never paid one dollar upon it, and is really, in equity, no more entitled to set

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aside the sale to Beach as irregular, and claim the title for himself, than would be any other person who might regard the property as a desirable possession.

What the effect of the payment by Daniels of the Prince execution, out of the funds in his hands as assignee, would have been, as between Beach and the creditors provided for in Watkins' deed of assignment, it is unnecessary to consider. The assignment has long since been closed up, and the assignee, as he swears, has been released. But as between Beach and Watkins, it is clear the payment by Daniels was simply an extinguishment of the lien of the judgment, and let in the mortgage to Beach as the incumbrance next in rank to that made by Bryan to Wylie. If Watkins were seeking to redeem for his own benefit, he would be required to pay, not only the amount of Beach's bid at the Wylie sale, but the amount of the mortgage to Beach.

If, then, Shaw were entitled to redeem at all, he would have to redeem as the naked assignee of Watkins' title, having paid no valuable consideration, but standing in his shoes, and he could claim no better terms of redemption than the court would give to Watkins. But in this proceeding, as it now stands, he has no right to redeem. He files the bill, not as one holding a legal title for the use of Watkins, and asking to redeem for his benefit, but he claims the property in his own right, for his own use, and on the utterly untenable ground of purchase. An appeal to the equity side of the court, upon a claim more thoroughly unsubstantial, is rarely made. The case is singularly bald. We have sought in vain a solitary element of equity in the complainant's demand. He claims as a purchaser, but is not one. He asks to be decreed the ownership of property for which he never paid a single dollar, and not only that it may be given to him without a particle of consideration, but that it be taken from one who has paid for it and advanced upon it its then full value, amounting to some ten thousand dollars. He asks that, through a transaction which, so far as he was concerned, amounted merely to a

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payment by a judgment debtor, with his own money, of the judgment debt, he should, by some legal legerdemain, be clothed with the equitable rights of a purchaser for a valuable consideration.

A court of equity gives or withholds its remedies according to the equity of the case made by the complainant. A suitor must not only come to the court with clean hands, but he must come as well with rights in the subject matter of his bill entitled to protection, and resting upon equitable grounds. It is immaterial how irregular may have been the sale under which Beach acquired the title and possession of the property, unless the court is asked to investigate that question by some person who has an equity of his own entitled to protection. *Nixon v. Cobleigh*, 52 Ill. 387. When Watkins, or Daniels as assignee for the benefit of creditors, if there are any yet unpaid, shall file a bill, we will consider their equities, if not lost by *laches*, but as to the case now before us, brought by Shaw for his own benefit, and not as trustee for Watkins or the creditors, we simply say he shows no equity in the property which demands the protection of the court.

When asked to administer equitable relief, the court looks through the forms of transactions to the substance. In the circumstances under which it was given, the mere certificate of purchase issued by the sheriff to Shaw, amounted to nothing. Of itself, it would have been *prima facie* evidence that he had acquired certain rights. But when the facts are disclosed, we see he acquired none as against Watkins, his grantees or creditors. The certificate was a mere sham. It rested upon a falsehood. The name of Shaw was used as a mere matter of form, and that he himself attached to it no importance, is shown by the fact that for ten years he made no claim, and did not even take out a sheriff's deed.

The decree is reversed and the cause remanded.

Decree reversed.

Opinion of the Court on rehearing.

The foregoing opinion was filed of the September term, 1870, and at the September term, 1871, a petition for a rehearing was presented and allowed, and afterwards the following additional opinion was filed as of the latter term.

Mr. CHIEF JUSTICE LAWRENCE delivered the additional opinion of the Court, on the rehearing :

The foregoing opinion, of September term, 1870, having been again considered by the court, on the re-argument allowed in this case, we see no reason for changing the views therein expressed. The counsel for appellee seems, from his argument, to misapprehend the position taken in the opinion. He cites various authorities for the purpose of showing that the holder of the legal estate under the mortgagor, is the proper complainant in a bill to redeem, and that it is immaterial whether he holds such estate as a trustee for others, or claims it in his own right by a conveyance from the mortgagor made without consideration. This proposition we have had no intention of denying, and it is hardly necessary to cite authorities in its support.

But the complainant in this case is asking something more from the court than its aid in the exercise of a plain right of redemption from an unforeclosed mortgage. He is also asking us to set aside a sale made some ten years before filing his bill, on the ground of an irregularity in the mode of conducting it, that is shown not at all to have affected its fairness, and at which sale a third person became the purchaser in perfect good faith, paying for the property a sum of money that, added to his own incumbrance, considerably exceeded its value, and receiving immediate possession in which he has been undisturbed until the filing of this bill. In this case, we should have probably held the delay of ten years in questioning the sale would have been, of itself, in view of the peculiar circumstances, a sufficient reason for not setting it aside, if that fact had been raised by the appellant in his answer, as required by the case

Opinion of the Court on rehearing.

of *School Trustees v. Wright*, 12 Ill. 441, an authority we are reluctant to overrule, but with which we are not altogether satisfied when applied to cases in which the *laches* appears upon the face of the bill. Now, while we concede, as claimed by appellee's counsel, that a grantee of the mortgagor, whether claiming as trustee for others or in his own right, and whether a purchaser for value or a mere volunteer, would have the same right to set aside the former sale as the mortgagor himself, yet it by no means follows that a court of equity would set it aside for the benefit of one who has acquired the naked title of the mortgagor in the mode disclosed by the present record. This mode is sufficiently explained in the former opinion. He paid nothing. His name was used merely because he was the clerk of the assignee. What became of the other property, in connection with which this was sold *en masse*, does not appear. But the assignee, probably regarding this property as lost by the foreclosure, neglects to take from the complainant, his clerk, an assignment of the sheriff's certificate of purchase, and ten years later the complainant sues out a sheriff's deed, and, the assignment having long since been settled, claims to own this property in his own right, and on that ground files his bill asking the court to set aside, for his personal benefit, the sale made under the mortgage, and to decree a conveyance from Beach to himself as owner in his own right. In this bill, in which he claims the property as purchaser for a valuable consideration and owner in his own right, he makes Watkins a party defendant, with a view, we suppose, of cutting off any interest claimed by him. That the bill was not filed in the name of Shaw with the consent of Watkins, and for his benefit, is evident not only from the face of the bill, but from the evidence of Watkins himself, who was called by defendant as a witness, and from whose testimony it appears he knew nothing about the suit and had nothing to do with its prosecution.

The presumption from this record is, that he is entirely content with the sale under the mortgage, and has never sought,

Opinion of the Court on rehearing.

and does not now seek, to have it set aside.

When, then, we remember that the only persons who have any real interest in this property, entitling them to call in question the regularity of the sale under the mortgage, are either Watkins, or his assignee, Daniels, as trustee for Watkins' creditors, or the creditors themselves named in the assignment, and that this bill sets up a title in complainant for his own use merely; and when we consider how this title was acquired, we must repeat what we said in our former opinion, that the complainant's case is singularly bald. To say that it is like the case of a voluntary grantee of a mortgagor coming to redeem the mortgage, is an entire misapprehension of the true position of the complainant, as disclosed upon the face of this record.

But it is urged that though the complainant is not prosecuting this suit for the benefit of Watkins, he is prosecuting it as trustee for the unpaid creditors of the second class in the assignment from Watkins to Daniels, or at least, that the court can not say he is not so prosecuting it. It is enough for us to say that he does not stand in that position on the record. He is here claiming to own this property in his own right, and the proof shows that he does not. The proof shows that if Watkins and his creditors in the assignment to Daniels, are satisfied with the sale under the mortgage, it ought not to be disturbed. When the complainant insists in the argument that he is appearing for the creditors, we must reply that he should have so stated in his bill, and Daniels and the creditors should have been co-complainants. We then should have had a bill which the proofs would have fitted. The absolute necessity of having not only Watkins before the court, but also Daniels, and the creditors for whose benefit the complainant pretends to prosecute, is manifest from this single consideration. The money paid by Daniels on the execution sale, when this certificate of purchase was issued to complainant, was paid out of the fund held by him as assignee. Now, if those debts are paid or discharged, the residuary interest in the property would go back

Opinion of the Court on rehearing.

to Watkins, and he would be the person entitled to redeem from Beach. But he, in redeeming, would clearly be obliged to pay, not only the mortgage under which the sale to Beach was made, but also the Beach mortgage. Whether the creditors under the assignment would be equally obliged to redeem from the Beach mortgage, is a much more difficult question, and one which we ought not to decide without giving them an opportunity of being heard. Beach also should have an opportunity of contesting the indebtedness claimed to be due.

Our view of the case is briefly this, and we re-state it to prevent a further misunderstanding, either willful or unintentional: The only persons entitled to call in question the regularity of the sale to Beach, are Watkins, occupying the position of mortgagor, Daniels, his assignee, or the creditors, through Daniels as their trustee. If these parties are content to waive the irregularity in the sale, no one else has a right to complain. If, however, they or any of them wish to redeem, while the bill would be properly filed in the name of Shaw as the grantee in the sheriff's deed, they should also be made parties, in order to a proper taking of the account and a proper adjustment of all the equities, and the bill should be framed for the assertion of their equities and to meet the facts as they exist. If they do not wish to prosecute, this complainant has no equities of his own to assert, and the unavoidable inference would be that the legal title which his counsel urges so strenuously, as vested in him by the sheriff's deed, was obtained by an improper use of the sheriff's certificate of purchase, without the concurrence of the real owners, ten years after it was filled out in his name, as clerk of the assignee. If, without the knowledge of Watkins, or of Daniels, or of the creditors, he has at this late day discovered this certificate, and by procuring a sheriff's deed, sought to acquire the title to this property for his own behoof, then, notwithstanding he has, upon the face of the papers, the title of the mortgagor, yet we must hold, when he comes into court asserting such title as his own, he comes with no equities in his favor that should induce the

Syllabus.

court to disturb a sale that has never been questioned by any of the parties having an actual interest in the property.

Of course we speak only of his claim as presented upon this record. If he is prosecuting this suit for the benefit of persons having an interest in this property, which entitles them to question the sale, they should be brought before the court as parties to a bill framed to correspond with the facts. The complainant will have leave to amend his bill and make new parties, upon paying the costs.

The decree is reversed and the cause remanded.

Decree reversed.

THE CITY OF AURORA

v.

JACKSON REED *et al.*

87	29
22a	181
87	29
29a	122
87	29
145	29

57	29
212	*411

1. **PLEADINGS—evidence—variance.** Where the declaration in an action against a city for having so graded a street as to cause water to run therefrom into plaintiff's building averred that water from the street ran into plaintiff's building, and the evidence showed the water ran from the street over a space of a few feet before entering the building, there was no variance.

2. **STREETS—grade—repairs.** A city has full control over the grade of its streets, and may adopt such angle as the authorities may choose, and may lower or elevate it, at will, and the owners of lots adjacent to the street can not call it to account for errors of judgment in fixing the grade, or recover damages for inconvenience or expenses produced in adjusting the level of their premises with the street. But a city has no more power over its streets than a private person has over his own land, and the city, under the plea of public convenience, can not be allowed to exercise that dominion, to the injury of the property of another, in a mode that would render an individual liable to damages, without itself becoming responsible. The rule of law which protects the right of property of one individual against another individual, must protect it from similar aggressions on the part of municipal corporations.

Syllabus. Opinion of the Court.

8. If a city, in fixing the grade of a street, turns a stream of water and mud on the grounds or cellar of a citizen, or creates in his neighborhood a stagnant pond that generates disease, it becomes liable to respond in damages.

4. *CITY—liable for damages for improper grade.* Where the city, through its proper officer, fixes the grade of a street, and property owners improve the street under the direction of the officer, and the improvement of the street is so made that water from rains and melting snow runs to and discharges itself over a lot owned by an individual, the city is liable for damages. The city has no right to turn surface water on private property, nor does it change the principle that the street was improved before the lot was. Nor does it change the liability of the city, by showing that other property owners on the street filled up a portion thereof in front of their lots, so as to turn the water on plaintiff's house. If the officials of a city permit persons to place obstructions in the streets, the city will be liable for injury resulting therefrom.

5. It is no defense to show that plaintiff might have dug ditches that would have protected his property; he was under no legal obligation to do so, and the city was. It was the duty of the city to provide proper sewerage to carry off such water. It is armed with ample power to provide proper means therefor; if necessary it could condemn ground for the construction of sewers, or use the streets therefor as far as practicable.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

The opinion states the facts of the case.

Messrs. CANFIELD & NICHOLS, for the appellant.

Mr. C. J. METZNER, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought against the city of Aurora by appellees, to recover for damages caused by surface water, which ran from an adjoining street into and upon the premises of appellees. Their building was situated on River street, which runs north and south near the west bank of Fox River. The street is occupied for business purposes, and the

Opinion of the Court.

buildings come to the line of the street on both sides. Before the buildings were erected, all the surface water from rain and snow, westward of this street, flowed to the river over these lots, much of it passing over the lot on which appellees' house is erected. There being a depression in the ground, inclining from the west towards the river, the erection of buildings on the west side of the street, which were from time to time built and filled the block, obstructed the natural flow of the water caused by rain and snow, and turned it into the cross streets running east and west, and leading into River street, thus largely increasing the volume that flowed along that street in front of appellees' premises.

It appears that in 1862, and while Dunning owned this lot, the property owners of the block entered into an arrangement with the city authorities, by which they were to put in a gutter in front of their property; Dunning afterwards refused to carry out the arrangement, but the others constructed the gutter under the direction of the street commissioner. Dunning sold this lot in 1864 or 1865, to Smith, the lessor of appellees, who erected thereon the building occupied by appellees. This building obstructed the flow of water over the lot, as it had previously run. Appellees kept in the house a grocery store and eating house, the basement being used as a dining room. On at least three occasions, when heavy rains had fallen, the water ran into the basement of appellees' building, to the depth of from one to three feet. It occasioned some damage to their property, the loss of the use of the room some days, required labor and expense in removing the water, and some of their boarders left. The jury found a verdict in their favor for \$56.81. A motion for a new trial was entered, but overruled by the court, and judgment entered upon it, and the case is brought to this court by appeal, and a reversal is asked, on several grounds.

It is first insisted, that the court below erred in refusing to exclude the evidence, because of a variance between it and the declaration. The first and second counts aver that the

Opinion of the Court.

city caused the street to be graded in so negligent and improper a manner "as to cause water from said street to run into said building." In the third count, it is averred that the city graded the street in a negligent manner, and failed to construct sewers and drains, by reason whereof when it rained the water "was forced into and flowed into said building and basement," so adjoining and abutting on the street. Thomson Reed testified, that no water came in under their side walk, but it came under the side walk in front of the lot next south of theirs, and struck the southwest corner of the building, and parted and went both ways; by which we understand that when it parted at the corner, a portion ran along the base of the building on the south side, and a part along the base in front; that this water entered the building both from the west and south sides.

It will be observed, that this water came from the street, and it is alleged that the defective grading caused it to leave the street and flow into the building. Now, it is apparent that if the grading was so made as to turn the water from the street, and it struck, in its course, the house, and a portion following along its base on the south side and several feet from the street, still it flowed from the street into the house, or was forced by its own gravity from the street into the building.

The declaration does not state that the water ran directly from the street into the house, without passing over any intervening space, but that water from the street ran into the building. If the evidence is true, it proves the averment that the water from the street ran into the building. If there is any variance, it is so extremely slight that we are unable to perceive it. There was no variance requiring the exclusion of the evidence from the consideration of the jury. The third, fourth and fifth of appellant's instructions were based upon the same idea, that there was a variance, and for the reason that the evidence was admissible, they were properly refused.

In the case of *Nevins v. The City of Peoria*, 41 Ill. 502, it was held, that a city has full control over the grade of its

Opinion of the Court.

streets, and can make them on such angle as they choose, and may lower or elevate them at pleasure, and the owners of lots adjacent to the streets can not call it to account for errors of judgment in these particulars, or recover damages because they incur inconvenience or expense in adjusting the level of their premises to that of the street, for purposes of ingress and egress. But a city has no more power over its streets than a private individual has over his own land, and the city, under the plea of public convenience, can not be permitted to exercise that dominion to the injury of the property of another, in a mode that would render an individual liable to damages, without itself becoming responsible. The same rule of law which protects the right of property in an individual against invasion from another individual, must protect it from similar aggressions on the part of municipal corporations.

If, in fixing the grade of a street, a city turns a stream of mud and water upon the grounds and into the cellar of one of its citizens, or creates in his neighborhood a stagnant pond that generates disease in his family, it becomes liable to respond in damages. This case was followed by the case of *The City of Aurora v. Gillett* 56 Ill. 132, which announces the same rule.

In this case, it appears that the city had, through the proper officer, fixed the grade some years previous to the time when the injury complained of occurred. It is true, the property owners improved the street, but it was under the direction of the officer. And the evidence tends to show that it was so done that the water which fell in rains, and from melting snows, run from both north and south of the premises occupied by the appellees, and discharged itself over the lot on which this building was erected and one which adjoined it. The city had no right to turn this surface water upon this or any other lot. In a state of nature it was not, so far as we can see, accustomed to convey all the water which accumulated in the street to its outlet into the river. The city had no right to render this lot worthless, and thus deprive the owner

Opinion of the Court.

of its use, without making full compensation for the injury done. Nor does it change the principle, that the improvement of the street was made before the house was erected. The owner had the undoubted right to improve and occupy his lot, and if the city had turned the water upon it, they should have taken the necessary steps to remedy the wrong they had done, in so grading the street as to cause the water to flow over this lot.

Nor can it change the liability of the city, by showing that others filled up a portion of the street in front of their property, so as to turn the water upon this property. The improvement of the streets is in charge of the city, and is entirely under its control, and it is the duty of the city officials to prevent obstructions from being placed in the streets, and, neglecting that duty, the city must be held liable for the damages resulting therefrom. Nor is it a defense to show that appellees might have dug ditches or made other improvements that would have protected their property from loss. It is enough to say that they were under no legal obligation to perform a duty which devolved upon the city. The adjoining lot did not belong to them, and they had no legal right to construct a sewer over another man's property, or to turn the water on his lot. It was the duty of the city to provide suitable and proper sewerage to carry off water that accumulated in this and other streets. It is armed with the necessary power to provide the means, and if need be to condemn the ground required for sewers, or to use the streets for the purpose when practicable. We fail to perceive that any defense is shown to a recovery in this case.

This disposes of the questions raised on the refusal of the court to give a portion of appellant's instructions; and the instructions given for the city were certainly as favorable, if not more so, than it had the right to ask.

The judgment of the court below is affirmed.

Judgment affirmed.

JAMES BUSSELL, Administrator, *et al.*

v.

THE TOWN OF STEUBEN.

57 35

181 391

57 35

59a 203

TOWNSHIPS—*of their liability to a private action for neglect of duty in keeping highways in repair.* Organized townships, established by law as civil divisions of counties merely, are not liable, in their corporate capacity, to a private action for damages occasioned by their neglect to keep their public highways in repair.

WRIT OF ERROR to the Circuit Court of Marshall county ;
the Hon. SAMUEL L. RICHMOND, Judge, presiding.

This was an action on the case, brought by the plaintiffs against the township of Steuben, in Marshall county, to recover for the death of Charles Doran, occasioned, as alleged, by the neglect of the defendant to keep a certain bridge in repair.

Judgment was rendered for the defendant, and the plaintiffs bring the record to this court

Messrs. BANGS & SHAW, and Messrs. FORT, BOAL & LAWS,
for the plaintiffs in error.

Messrs. BURNS & BARNES, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was an action on the case, to recover damages for a death occasioned by a defective bridge, and a verdict and judgment for the defendant.

We can not distinguish this case, in principle, from the case of *The Town of Waltham v. Kemper*, 55 Ill. 346, and we do not desire to add anything to what was said in the opinion in that case. In the case cited, it was held, that an organized township was not liable in its corporate capacity for such injuries.*

*It was decided in the case of *White, Admr., v. The County of Bond*, January Term, 1871, that a county was not liable, in its corporate capacity, to a private action for injury resulting from a defective highway.

Syllabus.

We see nothing in this case to distinguish it from that, and accordingly the judgment must be affirmed.

Judgment affirmed.

57 36
31a 219
57 36
31 519
57 88
46a 177
57 36
56a 540

57 36
189 468

57 36
95a 4344

CHARLES W. CONSTANTINE

v.

AARON H. FOSTER.

1. **EVIDENCE—*in replevin*.** The averment in a plea in a replevin suit, of property in the defendant, being but inducement to a traverse of the averment in the declaration of property in the plaintiff, and such plea having put plaintiff to the proof of property in himself, any evidence which tends to show the plaintiff is not the owner is legitimate, and it is error to reject it on the trial of the issue.

2. **SAME—*pleadings*.** The 14th section of the Practice Act (R. S. 1845) does not change the rules of pleading in the action of replevin, so as to require a plea of property in a stranger, before such proof can be made, where the ownership of the plaintiff is traversed.

3. **PLEADINGS—*traverse of plaintiff's title*.** When the averment in the declaration, of ownership by the plaintiff is traversed, he is put on proof of title against the world, and he must prove title to recover; in a plea of property in the defendant, or a stranger, traversing plaintiff's ownership, the only issuable fact in the plea is the plaintiff's ownership, and he must recover on his title, and the burden of the proof is on him.

4. **EVIDENCE—*under such a plea*.** Under such an issue it is error to prevent the defendant from proving property in a third person. It is pertinent to the issue, and tends to prove the plaintiff was not the owner, and even under the plea of *non detinet*, it is competent for the defendant to prove that the plaintiff is not entitled to possession of the property.

5. **MOTIONS FOR NEW TRIAL—*when grantable*.** When a trial was had at one term of court, and a motion was entered for a new trial, and the motion was continued until the next term, when the motion was withdrawn, and the other party entered a similar motion, and a new trial was granted:

Syllabus. Statement of the case. Opinion of the Court.

Held, it was not error, as the record was still before the court, and the granting of a new trial is a matter of discretion.

6. In such a case, the 24th section of the Practice Act has no application, as it applies to setting aside verdicts and judgments for irregularities, and requires that to be done at the term of court at which the judgment or verdict was rendered; but the same section provides that new trials may be granted before final judgment.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

This was an action of replevin, brought by Aaron H. Foster, in the Superior Court of Chicago, against Charles W. Constantine, to recover the furniture and lease of the Pacific House, in Chicago. The facts involved appear in the opinion of the court.

Messrs. HIGGINS, SWETT & QUIGG, for the appellant.

Messrs. SWAIN & WELLS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Under the issues formed in this case, we are of opinion that it was error in the court to refuse to permit the evidence tendered by the appellant, to go to the jury, to prove that at the time the property in question was sold to the appellant the appellee did not own it, and had no right to its possession, and that he had no title whatever to it, but that the absolute ownership was then, and had ever since been, in E. R. Benedict.

The appellee, in his declaration, averred that the appellant "took the goods and chattels of him, the plaintiff," to which the appellant filed two pleas: First, *non detinet*, upon which issue was joined.

The appellant's second plea is, in effect, a special or formal traverse, averring, by way of inducement, property in himself, and traversing, under the *absque hoc*, the appellee's allegation

Opinion of the Court.

of ownership in the property. The appellee's replication to this plea traverses the appellant's allegation of property in himself, and re-affirms the original allegation of ownership as alleged in the declaration.

The effect of the second plea was simply to put in issue the appellee's title to the property, and his right of possession. It seems to have been uniformly held that the allegation of property in the defendant, is merely inducement to the formal traverse of the right of property in the plaintiff, and performs no other office. It is not even traversable. The question raised by the plea is not whether the property is in the defendant, but whether the right of property and the right of possession are in the plaintiff. It puts in issue the plaintiff's title to the property, and any evidence that tends to disprove that right is legitimate and proper.

It is insisted on the part of the appellee, that inasmuch as the statute has provided (R. S. § 14, p. 415,) that "the defendant may plead as many matters of fact, in several pleas, as he may deem necessary for his defense," if the defendant wishes to offer evidence that the title to the property is in a stranger or a third party, he must plead the name of such third party, or the plaintiff would be surprised on the trial, and would be unprepared to meet the evidence. We do not so understand the rule. The traverse of the plaintiff's title to the property puts him on proof that he owns the property as against all the world, and he is expected to be prepared to maintain that issue. The authorities go to the extent of holding, that if the plaintiff traverses the defendant's allegation of property in himself, or a stranger, such traverse is immaterial and forms no part of the real issue to be tried. Under the plea of property in a defendant or a stranger, in an action of replevin, with a denial of the right of property in the plaintiff, the only issuable fact is, the right of property in the plaintiff, and under such an issue the plaintiff must recover on the strength of his own title, and the burden of proof is on him to establish his right. Such is the doctrine of the case of

Opinion of the Court.

Anderson v. Talcott, 1 Gilm. 371. The rule there stated is fully supported by authority. *Gotloff v. Henry*, 14 Ill. 384; *Hunt v. Chambers*, 1 Zab. 627; *Rogers v. Arnold*, 12 Wend. 30; *Noble v. Epperly*, 6 Ind. 414; *Prosser v. Woodward*, 21 Wend. 205; *Johnson v. Meale*, 6 Allen, 229; *Seibert v. McHenry*, 6 Watts, 303; *Cullom v. Beavin*, 6 Harr. & J. 469.

Consistently with the rule established by the above cases, we hold that the evidence tendered by the appellant to prove that the title of the property in question was in E. R. Benedict, and not in the appellee, was admissible, and ought to have been allowed to go to the jury for their consideration, in connection with the other evidence in the case. It was pertinent to the issue, and would tend to disprove the fact that the appellee was required to maintain, viz: the right of property in himself.

The appellant offered to prove, in connection with the evidence above alluded to, and was refused the privilege, that the plaintiff was not entitled to the possession of the property. This evidence was admissible even under the plea of *non detinet*, and it was error in the court to exclude it.

For the reasons indicated, the judgment must be reversed and the cause remanded; and inasmuch as the case will have to be submitted to another jury, we deem it improper at this time to comment on the weight of the evidence to support the verdict, or to discuss the case on its merits.

It appears from the record, that this cause was first tried at the December term, 1869, when the jury returned a verdict in the following form: "We, the jury, find the defendant not guilty," and thereupon the plaintiff entered a motion for a new trial. Pending this motion, the cause was regularly continued to the January term, 1870, at which time the plaintiff withdrew his motion for a new trial, and thereupon, at that term of court, the defendant entered a motion for a new trial, which motion the court allowed and awarded a new trial.

The appellee, under the statute, now assigns for error the ruling of the court in awarding a new trial on the motion of

Opinion of the Court.

the defendant, at the January term, 1870, and submits that the appeal in this cause, for that reason, ought to be dismissed.

As a general rule, judgments are rendered at the term at which the trial of the cause is had, but if, for any reason, the cause is continued, we can perceive no reason why either party may not enter a motion for a new trial at any time before final judgment. The latter clause of sec. 24, R. S. p. 417, to which our attention has been called, does not seem to us to have any application to this case. That clause of the statute has reference only to setting aside verdicts or judgments for irregularity, and provides that the objection must be taken at the term of the court at which the judgment or verdict is given. The same section provides that the motion for a new trial may be entered before "final judgment."

In this instance, the cause was regularly continued, pending the plaintiff's motion for a new trial. As soon as that motion was withdrawn, the defendant availed of the first opportunity to enter his motion for a new trial, and that was before "final judgment" in the case, and therefore in apt time. The granting of a new trial is in the discretion of the court, and when the court has once exercised that discretionary power, and awarded a new trial, the appellate court will not review its action in that regard. *Weaver v. Crocker*, 49 Ill. 461.

The cause was still pending before the court at the January term, and no final judgment had then been entered. For what cause, the record does not disclose, but in the exercise of a discretionary power with which it is clothed, the court did award a new trial, and this court can not review its action in the premises.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus.

MILO WINCHELL *et al.*

v.

CARRIE EDWARDS *et al.*

57	41
157	254
57	41
61a	633
57	41
65a	311
57	41
167	144
167	547

1. **MORTGAGE—foreclosure—*scire facias*.** It is legal and proper for the mortgagee to foreclose a mortgage by *scire facias* for the use of another person. And such a judgment is valid and conclusive upon parties, and privies, the latter being of three kinds—by blood, in law and by estate. The heirs of a defendant to such a proceeding are privies, and concluded by the judgment.

2. **SALE ON EXECUTION—*en masse*—may be set aside—when.** Although the execution is valid, and both the judgment and execution properly described the land, the irregularity in selling *en masse*, instead of in parcels, gives the defendant a right to have the sale set aside, and so with other irregularities, but the right may be lost by *laches*.

3. **SAME—*acquiescence in*.** Where a defendant was present at the sale, and cognizant of the judgment, and manner in which the sale was conducted, and remaining in the country for nearly a year after the time for redemption had expired, and taking no steps to set the sale aside, and then leaving for California, there arises a strong presumption of acquiescence, and his heirs can be in no better position.

4. **SAME—*description of the premises*.** The description of the premises ordered to be sold by the judgment and execution, was, lot 2, block 51 in school section addition to Chicago. The lot was levied on as thus described, and is the same in the sheriff's deed, with these additional words, "except 59 feet off the west end" sold to McGraw, of which he was then in the occupancy: *Held*, that even if this exception was uncertain and void, still that is no ground for setting aside the sale, as it is a matter by which McGraw or his grantee alone could be affected.

5. **EVIDENCE—*destruction of by parties*.** Where a party is proved to have suppressed any species of evidence, or to have destroyed or defaced any written instrument, a presumption arises that had the truth appeared it would have been against his interest, and the fabrication of evidence raises a presumption against the party doing so, no less than when evidence has been suppressed or withheld.

6. **ESTOPPEL—*title—equity*.** When a party assists another in the sale of property, the legal title to which is in the seller, and recommends the title as being good in the vendor, such party thus assisting the sale will not be permitted to set up a secret equitable title in himself against such purchaser thus induced to buy and pay for the property.

APPEAL from the Superior Court of Chicago.

The general subject matter of this controversy is, lot No. two, block fifty-one, School Section Addition to Chicago, situate upon the corner of Canal and Adams streets in said city, and being about sixty-four feet upon Canal and one hundred feet upon Adams street. The particular subject matter is the south thirty-three feet, of the sixty-four fronting upon Canal.

It appears that on the first of April, 1844, John M. Edwards and Edwin Edwards, being seized in fee of said lot two, borrowed three hundred dollars of one Slocum, for which they gave their note payable in three years, with interest at the rate of twelve per cent per annum, and a mortgage upon said lot two, which was duly executed and filed for record the same day.

On the 28th of June, 1844, J. M. and Edwin Edwards conveyed said south thirty-three feet to one Wilcox, who, on the 30th of September, 1845, reconveyed the same to John M. Edwards. In January, 1845, J. M. and E. Edwards sold and conveyed, for the consideration of two hundred dollars, fifty-nine feet on Adams street, and off the west end of said lot two, to one Henry McGraw, who soon after took possession, built upon and occupied the same. That parcel was released from the mortgage. That on the 2d of December, 1847, John M. and wife conveyed to Edwin Edwards the undivided half of the north half of said lot two; that on the 2d of December, 1847, said John M. and wife, by warranty deed, for the consideration of three hundred and fifty dollars, conveyed to Charles M. Edwards the south thirty-three feet in question, subject to the Slocum mortgage, but which deed Charles M. testifies was only as security. On the 19th of October, 1848, Slocum, by an assignment under seal, and reciting the consideration of two hundred and thirty-six dollars, assigned, transferred, and set over the Edwards mortgage to him, to Milo Winchell, and also endorsed the note to him. On the 3d of

Statement of the case.

November, 1848, a writ of *scire facias* was sued out of the Cook county circuit court, in the name of Slocum for the use of Winchell, to foreclose said mortgage. John M. and Edwin Edwards were parties defendant. It was served on them on the 8th, and, making no defence, their default and judgment were entered on the 22d of the same month, for four hundred and sixty-seven dollars and costs; the premises ordered to be sold, and execution to issue. On the 7th of December, 1848, the execution was issued, and on December 11th levy made. On the 11th of April, 1849, the premises were sold under the execution, and bid in by Winchell for the amount of the judgment.

The sheriff issued the certificate of sale to Winchell, describing the premises as lot two, block fifty-one, School Section Addition to Chicago, except fifty-nine feet on Adams street. The premises not having been redeemed within the fifteen months, the sheriff, on the 12th of October, 1850, executed a deed to Winchell.

It appears that John M. Edwards was present at the sale, and fully cognizant of all the proceedings. Without taking any steps to question their regularity, he left in the early part of December, 1851, to go to California, and his family quit possession. On the 26th of November, 1851, Winchell leased the south half of the house on said lot two to appellant Doolittle, who soon after went into possession, and on the 7th of June, 1852, Winchell sold, and by deed executed by him and wife, conveyed the south thirty-three feet to Doolittle for the consideration of five hundred dollars, he paying three hundred dollars cash, and giving his note for two hundred dollars, payable in one year, which was paid.

It was stipulated by appellants' counsel, in the court below, that John M. Edwards died in February, 1852. It appears that at the time of his death, appellees were small children, and are his only heirs at law. This bill was filed by them November 21st, 1867, alleging that the money advanced by Winchell to Slocum, to procure the assignment of the mortgage, was a mere

Statement of the case.

loan by Winchell to J. M. and Edwin Edwards, and that he took the assignment of the mortgage and the legal title under the foreclosure, as security for the money so advanced ; that they had previously paid Slocum two hundred dollars on the note, which was not endorsed, and that the amount actually due was only about one hundred and sixty dollars ; that on December 1st, 1851, John M. Edwards, being about to leave this State for California, paid to Winchell the sum of one hundred and fifty dollars, in full for the amount due him under said mortgage to said Slocum, for that part of the said premises which had been conveyed to him in security, and that on that occasion Winchell gave to said Edwards a receipt to that effect, which receipt is now ready to be produced and proved as the court shall direct, and a copy whereof is as follows, namely :

“CHICAGO, Dec. 1st, 1851.

“Received of John M. Edwards one hundred and fifty dollars for his half of the mortgage which I hold of that part of lot two, block fifty-one, School Section Addition to Chicago, bounded as follows: Beginning at southeast corner of said lot and running west one hundred feet, thence north thirty-three feet, thence east one hundred feet, thence south thirty-three feet to the place of beginning.

“MILO WINCHELL.”

The bill then alleges that thereafter Winchell merely held the title to said premises in trust for John M. Edwards, and that he thereafter fraudulently sold and conveyed them to Doolittle, to defraud complainants, for the pretended consideration of five hundred dollars, which was not in fact paid, and that Doolittle had notice of the matters alleged.

The bill then alleges, that if Winchell did not loan the money and take the title as security, then, that the sale and proceedings should be set aside, for want of proper notice by the sheriff, for misdescription of the property, and because it was not sold in parcels.

The appellants answered separately and fully ; Winchell denying the loan, or taking the assignment of mortgage, or the title under the sale, as security or in trust ; avers that he paid the consideration out of his own funds and for his own benefit ; denies that J. M. Edwards ever paid him the one hundred and fifty dollars, or any part of it, as alleged, or that he (Winchell) ever executed the receipt set out in the bill, or authorized any one to execute it for him ; sets up the sale made to Doolittle as made upon a good and valuable consideration paid, and that Doolittle was advised by J. M. Edwards to make the purchase, and that it was made without any notice of any adverse rights ; also *laches*.

Doolittle makes a similar answer, setting up the defense of *bona fide* purchaser without notice ; equitable estoppel, by reason of J. M. Edwards advising him to purchase, and representing that the title in Winchell was good ; sets up possession from June 7th, 1852, and from thenceforth, and payment of all taxes under claim and color of title.

Replication was filed and proofs taken.

The court below heard the case upon the pleadings and proofs, and decreed that appellees had a right to redeem from the mortgage sale ; that an account be taken, redemption and conveyance to be made. From which decree an appeal was taken to this court.

Messrs. FULLER & SMITH, for the appellants.

Mr. W. T. BURGESS, for the appellees.

Mr. JUSTICE McALLISTER delivered the opinion of the Court :

The foreclosure of the mortgage by *scire facias*, in the name of Slocum, the mortgagee, for the use of Winchell, was legal and proper. *Camp v. Small*, 44 Ill. 37.

The judgment was, therefore, valid and conclusive, not only upon the parties, but also upon all persons in privity

with them. Such privity is of three kinds—by blood, in law, and by estate.

Appellees being heirs at law of John M. Edwards, one of the defendants in that judgment, they are privies, and concluded by it.

The execution issued upon the judgment was in due form and valid. In both the judgment and execution the premises were properly described. The irregularity of selling *en masse* instead of by parcels, is one which might have given the defendants in the execution the right to have the sale set aside, if they had taken any steps to do so. So with other irregularities of that character. But the right is one which may be lost by *laches*. *Walker v. Schum*, 42 Ill. 462; *Fergus v. Woodworth*, 44 Ill. 377.

James M. Edwards, the father of appellees, was present at the sale, and there is sufficient evidence that he was cognizant of the judgment, the sale and the manner of conducting it, and from the fact of such knowledge, and the fact of his taking no steps to question the propriety of the sale, from the time it was made until upwards of a year after the time of redemption had expired, and then leaving for California, as may be inferred, with the expectation of surrendering possession to Winchell, who had already leased his part to Doolittle, raises such a presumption of acquiescence on his part as would have precluded him from setting it aside. If he was thus precluded, as a matter of course, the appellees, his heirs at law, are in no better situation.

The description of the premises ordered to be sold by the judgment and in the execution, was "Lot No. two (2), in block No. fifty-one (51), in the School Section Addition to Chicago." The lot was levied upon as thus described. It is the same in the sheriff's deed, with these words thrown in: "Except fifty-nine feet on Adams street." That exception was made, no doubt, on account of the fifty-nine feet off the west end sold to McGraw, of which he was then in the occupation.

Conceding the exception to be uncertain, and for that reason void, still that is no ground for setting aside the sale in this case. It is a matter by which McGraw or his grantee alone could be affected.

The other aspect of this case, as presented by the bill, is, in substance, that Winchell advanced the money to Slocum upon the mortgage, for and as a loan to John M. and Edwin Edwards, under an agreement with them that he was to do so, take the assignment of the mortgage to him absolutely, foreclose it and bid in the premises, take the title and hold it as a security for the amount advanced; that when they, or either of them paid him, then he was to deed over to each his share of the property in severalty; that before this, John M. had become the owner, in severalty, of the south thirty-three feet. That in pursuance of this arrangement they did not redeem from the sheriff's sale, but that on or about the 1st of December, 1851, John M. paid Winchell one hundred and fifty dollars in full of the amount due him under said mortgage to Slocum, for that part of the premises which had been conveyed to said J. M. Edwards in severalty, and on that occasion Winchell gave him the receipt set out in the bill; that after giving the receipt, Winchell merely held said piece of land in trust for J. M. Edwards, and those claiming under him.

We have examined the evidence under this branch of the case, with all the care demanded by the peculiar duties which the law imposes upon the court of chancery with reference to the rights and interests of infants, and are clearly of opinion that it does not sustain the bill. Edwin Edwards and Francis Edwards, brothers of the late John M. Edwards, were introduced as witnesses to prove the agreement between Winchell, John M. and Edwin Edwards. The latter testified that the agreement was, that Winchell should re-convey the property to their wives. Francis testified that Winchell was to hold the property until he could make the most out of it, for the benefit of witnesses' brothers, John, Edwin and

himself and their families. Edwin and John M. were both in embarrassed circumstances at the time, the former having a judgment against him of upwards of \$3000. Edwin had given, in 1863, a statement under oath that Winchell held the property for the benefit of the creditors of John M. Edwards, of whom Francis Edwards was preferred. Charles M. Edwards, another brother, is introduced, and he testified that he had been the custodian of the alleged receipt for the one hundred and fifty dollars, claimed to have been paid by John M. Edwards to Winchell on the 1st of December, 1851; that John M. gave it to him to keep, just before the former started for California. This receipt, purporting to have been given by Winchell, was not only proved to have been a forgery, but the counsel for appellees admits that its execution was not proven, and that it probably was not executed by Winchell.

These brothers all appear to have testified under feelings of bitter hostility to Winchell, who is their brother-in-law. They were examined, on the part of appellees, generally in a very unfair manner, by leading questions suggesting the very answers desired, and upon vital parts of the case. They were called upon to give their conclusions from conversations which they evidently had never heard, or had forgotten, and in many instances to state what they had heard from third persons. To unsettle titles upon such evidence would be extremely dangerous.

And while we acquit the appellees of any participation in what we deem, under all the evidence, to be a most foul conspiracy against one of the appellants, yet, from what we can see as to the active management of this case, the fabrication of evidence of the payment of the one hundred and fifty dollars alleged to have been paid by John M. Edwards, when all the circumstances tend to disprove the fact of such payment, raises a strong presumption against those who appear to be real parties to the suit, which must affect the case of the appellees, however innocent they may be. "When a person is proved to have suppressed any species of evidence, or to

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have defaced or destroyed any written instrument, a presumption will arise, that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of the circumstances. The general rule is, "*omnia presumuntur contra spoliatorum.*"

"The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such practice, not less than when evidence has been suppressed or withheld." 1 *Phil. Ev.* (4th Am. ed.) 639.

We are fully satisfied that Doolittle was a *bona fide* purchaser without notice. Indeed, he seems to have purchased upon the advice and recommendation of both John M. and Edwin Edwards that Winchell's title was good. It is unnecessary to cite authorities to the effect, that if a party assist in making a sale of real estate, the legal title to which is in another, by recommending the title of the latter to be good, and thus induce the purchase, such party will not be permitted afterwards to set up a secret equitable title in himself, against such purchaser thus induced to buy and pay for the property.

The evidence shows that Winchell took possession of the premises under claim and color of title, before the death of John M. Edwards, and that he, and Doolittle, who holds under the same title, have paid all taxes upon the property, from and including the year 1851 to the time of filing this bill in 1867.

It is true, the answer is not so framed as to properly set up this defense, and we lay no stress upon it.

The court below should have dismissed the bill on the ground that it was not sustained by the evidence. Its decree is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

JOHN MENIFEE
v.
WILLIAM S. HIGGINS.

1. EVIDENCE—*suppositions*. Where a witness in his deposition testifies to mere conjectures and suppositions, it is error to admit such evidence to the jury when objected to by the opposite party.

2. ALLEGATIONS AND PROOFS. An averment in the declaration, that defendant agreed to pay plaintiff five per cent on the amount for which he should sell a mill of defendant, whatever it might amount to, is not sustained by evidence that defendant agreed to pay plaintiff five per cent, if he would sell the mill for five thousand dollars. In this there is a fatal variance between the contract declared upon and that proved.

3. COMMON COUNTS—*proof under*. Where a common count alleged an indebtedness of five hundred dollars for commissions on the sale of land and mill, such a count is not sustained by evidence of an exchange of the mill and land for other property. Had the special agreement been fully performed, and had nothing remained to be done but to pay the money due on the agreement, then a recovery might have been had under the common count, but plaintiff having failed to perform his part of the agreement, he can not recover.

WRIT OF ERROR to the Circuit Court of Mercer county ;
the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the facts of the case.

Mr. B. C. TALIAFERRO and Mr. B. F. BROCK, for plaintiff in error.

Messrs. PEPPER & WILSON, for the defendant in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

This was an action of assumpsit. The plaintiff below declared specially on a contract, and in *indebitatus* assumpsit. The special count alleged, that appellant agreed to pay appellee five per cent on the amount of the sale of a flouring mill and

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appurtenances, and that appellee agreed to and did effect a sale of the property for five thousand dollars. A judgment was recovered by appellee, for two hundred and fifty dollars. The only construction to be given to the pleading is, that the agreement was to sell for cash.

Higgins testified substantially that Meniffee agreed to give him five per cent if he would sell the property for \$5,000; that he exchanged the mill property for property in Muscatine, Iowa, and seven hundred and fifty dollars, with one Whipple, to which Meniffee assented, "if all was right;" that the property thus exchanged for the mill was valued at \$5,000; and that Meniffee afterwards took from Whipple property in Memphis, Tennessee, in place of the Muscatine property.

Meniffee positively contradicted Higgins. He testified that the property was to be sold for greenbacks or cash; and that upon examination, the Muscatine property was encumbered by a mortgage, and the title otherwise defective; and that he did not agree to trade for it. He further stated, that he made the exchange of his mill property for property in Memphis, Tennessee; that Higgins was not present and had nothing whatever to do with it; and that he did not take the Memphis property in exchange for the Muscatine property.

Two witnesses, introduced by appellee, testified that the agreement was to sell the mill property for cash.

The purchaser of the mill property and his brother corroborated Meniffee, and agreed in the statement, that no trade was effected for the Muscatine property, and that Higgins had nothing to do with the other transaction.

It further appears, from the evidence, that Higgins, in his visit to Iowa, was acting as much for himself as for his principal, and that he made inquiry about coal lands, and solicited one Swayne to join him in the purchase of the mill, and the formation of the company for mining coal.

The deposition of W. A. Ewing was read in behalf of appellee, under objection, and, no doubt, strengthened his case with the jury. In answer to the inquiry, whether Meniffee

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acquiesced in the exchange of his property for the Muscatine property, he replied: "I do not know, but from his conversation, I suppose he did." This witness detailed suppositions instead of facts. It was manifest error to permit this part of his deposition to be read.

There is, and can be, no pretense that the proof maintains the special count. The declaration alleges an agreement to pay five per cent on the amount of the sale, whatever it might be. The testimony of Higgins was, that he was to receive five per cent if he sold for five thousand dollars. The variance is too palpable to require comment.

Does the proof sustain the other count? It alleges an indebtedness "of five hundred dollars for commissions on the sale of land and mill." The agreement, as admitted by both parties, was, that a sale was to be made, not an exchange, to entitle appellee to the commission of five per cent. A party might be willing, and even anxious, to compensate liberally, upon a sale for cash, when he would pay nothing for a mere exchange of property.

It is a familiar principle, that when a contract had been fully performed, and nothing remains to be done, but the making compensation in money, such compensation may be recovered on the common counts. They are founded upon express or implied promises. The promise to pay depends on the performance. In this case, appellee has not fulfilled his agreement. He has not performed the special terms of the bargain, and is not entitled to the commission.

Judgment reversed and cause remanded.

Judgment reversed.

THOMAS WALLACE

v.

DUDLEY McLAUGHLIN.

57	58
144	224
57	58
147	324
57	58
163	223
57	58
98a	550

1. **VENDOR**—*declaring contract forfeited.* Although a contract for the sale of land reserves the right to declare it forfeited, and the right to retain the money already paid on the purchase in case the vendee fails to make prompt payment as the several installments of the purchase money fall due, still the vendor can not declare such a forfeiture where the land thus sold is incumbered, and he is unable to perform his part of the contract, by conveying a clear and perfect title according to the agreement.

2. Where the vendor has the reserved power of declaring a forfeiture, he can not do so, unless he is in a position, at the time, to compel a specific performance of the agreement.

3. **DELAY**—*in performing contract—as a bar to equitable relief.* Upon bill filed by a purchaser of land, to restrain a vendor from recovering land sold, and to be conveyed free from incumbrance, into the possession of which the purchaser had entered under the agreement, such relief will not be barred by his failure to make payments, by reason of the incumbrance on the land.

4. **FRAUD**—*misrepresentations.* Where a vendor falsely represents that his title is good and free from incumbrance, and thus induces the purchaser to forego an examination of the title, and the purchaser enters and makes payments and large improvements on the land before he learns of the incumbrances, and then refuses to make further payments on the purchase until the incumbrances are removed, he can not be held to be in default in making payments.

5. **SPECIFIC PERFORMANCE**—*defective title.* After the vendor has declared a forfeiture, and recovered in ejectment, the vendee may, notwithstanding the incumbrance, tender the balance of the purchase money, waive his right to insist upon a perfect title, and compel a specific performance of the agreement. It would be inequitable to permit the vendor to retain the money paid, to get the land with the valuable improvements placed thereon by the purchaser, and escape the payment of the taxes while occupied by the purchaser, and give the purchaser nothing but the use of the land. In such a case, it is equitable to decree that the purchaser pay the balance of the price agreed to be paid for the land, less the amount of the incumbrance, and to require the vendor to execute a deed with the covenants stipulated for in the agreement.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

This was a suit in equity, brought by Thomas Wallace, in the Will circuit court, against Dudley McLaughlin, for the purpose of enjoining the further prosecution of a suit in ejectment in that court, for the recovery of a certain tract of land sold by the latter to the former.

Messrs. RANDALL & FULLER, for the plaintiff in error.

Messrs. GOODSPEED & SNAPP and Mr. C. B. GARNSEY, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was a suit in equity, to perpetually enjoin the defendant from the prosecution of an ejectment suit against the complainant, and from interfering with his possession in a certain eighty acres of land in Will county.

On the 30th day of December, 1856, the parties entered into a contract under seal, whereby McLaughlin agreed that if Wallace should first make the payments stipulated, he would convey to him the land, clear of all incumbrances whatever, by a good and sufficient warranty deed, in fee simple; and Wallace agreed to pay \$1000, as follows: \$50 cash in hand; \$300 April 1, 1857; \$325 April 1, 1858, and \$325 April 1, 1859, with 10 per cent interest on all the payments, and to pay all taxes, with an express stipulation that in case of failure to make either of the payments, the contract should, at the option of McLaughlin, be forfeited and determined, and Wallace forfeit all payments made, and they should be retained by McLaughlin. B. W. Wallace was also a party to the contract, but subsequently sold his interest to Thomas.

Three notes were executed by B. W. Wallace and Thomas Wallace, for the three deferred payments, according to the agreement.

The payments made were, \$50 at the time of the contract, \$130 March 28, 1857; \$90 April 20, 1857; \$70 May 1, 1857;

\$6.93 May 8, 1857, a prior tax on the land. Soon after the purchase, the complainant went into possession of the land, and has remained in possession ever since; having paid all the taxes on the land during the time, and made improvements of the value of \$1500.

At the time of the contract, the defendant had a wife who is now living—they then lived, and now live, apart, and have, since making the contract, except a week or two.

There were, at that time, two subsisting mortgages upon the land, made by the defendant: one to George L. Fohe, commissioner of school lands, and agent for the inhabitants of Will county, dated August 10, 1847, to secure payment of \$101, with 8 per cent interest, five years after date, and one to Fernando C. Brown, dated August 11, 1847, to secure payment of \$126.37, with 6 per cent interest, on August 11, 1851, which have ever since been subsisting incumbrances upon the land, except the last, which was released September 9, 1861.

The vendor assured the vendees, at the time of the purchase, that there was no incumbrance upon the land, and that there was no need of going to the recorder's office to examine, and they relied upon his word.

The vendor boarded with the vendees at the time, and for some four months after, the value of which boarding was forty dollars, which was intended to apply to the contract. The vendor repeatedly said to the vendees, that he would not crowd them; at one time, that he never would, if they would pay the interest.

Complainant never heard of any incumbrance upon the land until after he had moved on it, and made all the payments above specified as made. Three or four months after the last payment fell due, Mr. Osgood, for the vendor, applied for payment, and complainant made objection, on account of the defect in the title. The vendor applied to the complainant for money, and, as complainant testified, he told the vendor he could not get any more money from him while these incumbrances were upon the land, to which defendant replied, "Pay me the \$1000 and let them debts wag." Defendant testified, he told Wallace

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to pay the money to Osgood, and he would pay the school and Brown mortgages, and him the balance of the money, and he would give a deed; that Wallace told him he had paid too much on the land already, and never would pay any more.

November 22, 1861, the vendor made a written declaration of forfeiture of the contract for non-payment of the two installments of the purchase money, which fell due April 1, 1858, and April 1, 1859; and that all payments made thereon were forfeited to the defendant, and had the same recorded the next day. November 25, 1861, defendant commenced a suit of ejectment against the complainant, for the land, by service of a copy of the declaration and notice. December 14, 1864, verdict and judgment were rendered therein in favor of the plaintiff, McLaughlin. September 26, 1865, Wallace made a tender to McLaughlin, under the contract, of \$1395, which was refused. May 29, 1865, the judgment in the ejectment suit was vacated, and a new trial granted. January 22, 1866, the bill in this case was filed.

These are the prominent facts in the case.

The first question that arises is, as to the right of the vendor to declare a forfeiture of this contract.

Laying out of view any objection to his doing so without some notice of his intention, after his conduct of forbearance and repeated expressions of indulgence to the vendees in making the payments, and without a surrender of the notes of the vendees, we are satisfied that he had no such right, because he was not in a condition to perform his own part of the contract.

During all the time, from the date of the contract to the declaration of forfeiture, the land was incumbered, and there was a contingent right of dower in it, so that the defendant could not make such conveyance as he had stipulated to do.

He was not in a position to compel a specific performance by the vendees. They contracted to pay for an unincumbered title, and they could not have been compelled to pay for such a title as this. And unless the vendor could have sustained a bill for a specific performance of the contract, he could not

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rescind it. *Brown v. Cannon*, 5 Gilm. 174; *Bishop v. Newton*, 20 Ill. 175; *Murphy v. Lockwood*, 21 Ill. 611; *Gehr v. Hagerman*, 26 Ill. 438.

It is next to be considered, whether the complainant's delay in making the payments for this land, is a bar to the relief asked for. It is apparent that the cause of the delay was the existence of the incumbrances upon the land.

When a party contracts to give a title free from incumbrances, the purchaser is not bound to pay his money and receive a deed while incumbrances exist against the property. *Bishop v. Newton*, 20 Ill. 175. So the complainant was in no default, in not performing this contract. The time of payment was not made material by the contract, further than in case of default the contract should, at the option of the vendor, be forfeited. This option was not attempted to be exercised until November 22, 1861.

In the meantime, the complainant had gone into the possession of the land, and made his payments of some two hundred and thirty dollars before he had any knowledge of the incumbrance, and made large improvements, in the hope, doubtless, that the defendant would discharge the incumbrances; one of which was released September 9, 1861.

Three days after the forfeiture was declared, defendant commenced his ejectment suit for the possession of the land. Of course, after this, the defendant could not claim or expect that the complainant would make any further payment; and the complainant might well be indulged in awaiting the result of the suit, upon his rights. Finding, by that result, that his equities would not be considered in a court of law, he concluded to take such a title as defendant could give, and made the tender above named. This defective title he had a right to pay for and accept, but was not bound to do so, under the contract.

The claim of the defendant, on declaring the forfeiture, amounted to this: that he should have back the land and all the improvements that had been put upon it, and keep all the payments that had been made; that complainant should lose,

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in addition, all the taxes he had paid ; his only benefit being the possession of the premises he had enjoyed ; the rent was put at two hundred dollars a year, but a proportional part of that would be on complainant's own improvements.

When the defendant found that he could not perform the contract on his part, and that, by reason thereof, complainant would not further perform, defendant's conduct had created such equities in respect to the land, that it properly required the aid of a court of equity to adjust them, and it was rather the duty of the defendant to have applied to such a court to adjust the equities of the parties, than to resort to a court of law to enforce his own unconscientious claim in the matter.

The defendant's fraudulent representations, that there was no incumbrance upon the land, thereby probably inducing the complainant to forego his attempted examination of the title, adds to the default of the defendant, and strengthens the complainant's claim for relief.

We think the circumstances of the case furnish a reasonable excuse for the delay that has taken place ; that the complainant's claim for relief is conscientious, and that it should be granted upon payment of all the unpaid portion of the purchase money, according to the agreement, less the amount due on the mortgage to George S. Fohe, commissioner of school lands, described in the pleadings and proofs. Complainant should be decreed to pay the mortgage, and its payment by him should be charged upon the land.

The complainant's case, in addition to the relief prayed for, might entitle him to the further relief of a deed from the defendant, to the covenants of which he might have resort, in case the contingent right of dower should become absolute.

The decree of the circuit court is reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

Syllabus.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY

v.

ISABELLA HERRING.

57	59
97a	4188

1. *PASSENGER—removal from railroad train.* Where a passenger went upon a train of cars, and offered a worthless piece of paper, claiming it to be a pass, and on being informed that it was not a pass, and the passenger refused to pay fare or leave the train, the servants of the company had a right to remove such passenger from the train at a regular station, and they may use the necessary force for the purpose.

2. *MEASURE OF DAMAGES.* In such a case, it is error to instruct the jury, in estimating damages, that they may consider whether the plaintiff in good faith believed she had a pass, and offered it in good faith, although the paper was not a pass. It was the duty of the passenger, on being informed that it was not a pass, to either pay the fare or leave the train at the first station.

3. *FORCE—unnecessary.* If, in such a case, the employees of a railroad company use more force than is necessary, then the company would be liable to damages, and the question of the good faith of the passenger, believing she had a valid pass, is wholly immaterial in assessing damages.

4. *NEW TRIAL—verdict against the evidence.* Even where the evidence is conflicting, if it preponderates strongly in favor of defendant, a verdict against him should be set aside and a new trial granted, and if refused, the judgment will be reversed for that error.

5. *INSTRUCTION—not calculated to mislead.* Although an instruction may not be properly limited, still if it is not calculated to mislead, that is not ground for reversal.

6. *EXEMPLARY DAMAGES.* It is not error in such a case to instruct the jury, that if the servants wilfully and negligently injured plaintiff, they would be authorized to give exemplary damages; as they were engaged in the furtherance and execution of the business of the company, the company were liable for the misconduct and negligence of their servants when thus engaged.

APPEAL from the Circuit Court of Henry county; the
Hon. GEORGE W. PLEASANTS, Judge, presiding.

The opinion states the case.

Opinion of the Court.

Mr. GEORGE C. CAMPBELL, for the appellants.

Mr. A. C. MASON, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Isabella Herring against the appellants, for injuries received by the use of unnecessary force and violence in expelling her from a car on the appellants' line. It appears the plaintiff, in October, 1865, entered a car at the town of Joliet, with the intent to proceed to Geneseo. When the conductor asked for her ticket, she offered him a piece of paper with some writing thereon, which, she testified, some person in Joliet had given to her as a pass. He told her it was not a pass, and was worthless.

She testifies that she had one dollar and sixty-five cents in her pocket, and that she told the conductor she had money enough to pay her fare to LaSalle, and that her son would pay on their arrival at Geneseo, but says she did not show any money.

Both the conductor, and another witness, who had charge of the sleeping car, testify that she positively refused either to pay her fare, or any part of it, although the conductor told her he would be obliged to put her off at the next station, if she would not pay, and reasoned with her some minutes in regard to her conduct. The conductor testifies that her answers were "short and crusty," and the witness Pike, swears she used profane language, declaring that she would not pay, and that there were not men enough on the train to put her off. The plaintiff does not claim that she offered to pay, but denies the use of any profane language.

When they arrived at the station, the conductor and Pike testify, she still refused either to pay or leave the car, whereupon they raised her from her seat by the arms, she resisting, and Pike carried her to the platform of the car. She testifies

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he then pushed her violently from the platform, and she fell on the ground. Pike testifies that he was compelled to carry her through the car, as she would not walk, but would sit down on the floor, and when they reached the platform of the car, he set her down, thinking she might still pay her fare, and that she at once slid down the steps of her own accord, and threw herself on the ground. The conductor followed her, and as she refused to rise, he lifted her and placed her on the station platform, in charge of the station agent. The plaintiff testifies that she was so badly hurt that she was not able to rise. Pike further testifies, that as he was carrying her through the cars she caught hold of the seats, and that he used no force whatever beyond what was necessary to remove her from the car. He also swears she did not say she had no money. The plaintiff swears that she was made very seriously ill by the bruising she received, and suffered for a long time

The jury found a verdict for \$2500 damages, on which the court rendered judgment, and the defendants appealed.

The court gave for the plaintiff, among other instructions, the following:

“If the jury believe, from the evidence, that the plaintiff entered the train of the defendant, to go to Geneseo, having in her possession what she in good faith supposed and believed to be a ‘pass,’ and that she in good faith presented said pass to the conductor of the train, the jury may take such facts into consideration, if proved, in estimating the damages in this case, although the paper presented as a pass was not in fact a good pass,—provided the jury further believe, from the evidence, that the defendant or its servants put her off the train in a wrongfully negligent manner.”

This instruction was erroneous, and tended to mislead the jury on the question of damages. As the plaintiff had no pass, and was informed by the conductor that the paper which she tendered as such was utterly worthless, it was her

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duty to either pay her fare or to leave the train at the first station, if required to do so by the conductor. If she refused to do either, the conductor had the right to compel her to leave, and to use the force necessary for that purpose, however repugnant the use of force towards a woman may be to that sentiment of deference and respect for all women, which happily belongs to all classes of American society. But this is not a question of gallantry or sex, but simply of legal right, and as this plaintiff confessedly declined to pay her fare, the company was under no obligation to carry her, and had a right, by its agents, to use all the force required to remove her. It would be preposterous to demand of railway companies, that they should permit all women, who decline to pay their fares, to travel unmolested in their cars, or that force should not be used to expel them, if they should so far unsex themselves as to make a resort to force necessary. The only basis of recovery in this case, if any, was that more force was used than was necessary. If there was, that was a ground for damages, and the only ground; and the question as to whether the plaintiff had supposed herself to have a pass, became wholly immaterial, after she was informed that the pretended pass was of no value. The instruction should not have been given.

But, independently of this instruction, we are of opinion this case should be submitted to another jury, on its merits. The right to recover, rests solely on the evidence of the plaintiff. She is contradicted, in some minor matters, by one of her own witnesses, and in all the material points by the conductor, and by Pike, who was called to his aid from the sleeping car. It is said, their agency in the transaction impairs the credit of their testimony, but certainly their interest in the suit is much less than that of the plaintiff, and their account of the affair is at least as probable.

Counsel for the appellants object to the sixth instruction. As an abstract proposition, it is not sufficiently limited, but in this case it could not mislead the jury, since the acts of the

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defendants' servants, even if willful, were committed while engaged in the furtherance and execution of the defendants' business, and the defendants would be liable for their misconduct, if they were guilty of any, as well as for their negligence. This has been often decided in this and other courts.

The judgment must be reversed and the cause remanded.

Judgment reversed.

GEORGE DUNNOVAN *et al.*

v.

BAZIL GREEN.

1. **RAILROAD ELECTION**—*for subscription—registry of voters.* At an election in a township for and against subscribing stock to a railroad company, under the charter which does not require a registry of the voters, the registry law of 1865 does not apply to such an election, the presumption being that this should be held like other township elections. But if a registry was required, the court does not hold, that its omission would avoid bonds in the hands of innocent holders.

2. **ELECTION**—*majority of the voters of the town—majority cast.* Where the charter authorizing the election, provides that when a majority of the votes shall be for subscription, it shall be made, it refers to a majority of the votes cast, and not a majority of the voters residing in the township.

3. **TAX**—*levied by auditor—excessive.* Where it appears that the Auditor of Public Accounts has levied a larger sum than is necessary for the payment of the annual interest on bonds registered in his office, under a specified election, and there is no allegation that no other bonds of the town are so registered in the auditor's office, the court will not presume the levy is excessive; that must be shown.

4. **AUDITOR**—*power to levy tax—constitution.* The act of the 16th of April, 1869, making it the duty of the Auditor of Public Accounts to ascertain the amount of interest that will accrue on town and other bonds registered in his office, and certify the amount to the county clerk, to be by him extended on the collector's books, and collected in the manner

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State revenue is collected, is not violative of sec. 5, art. 9, of the constitution of 1848. The last clause of that section vests the legislature with the power to require all property of individuals in the corporate limits, to be taxed for the payment of debts contracted under authority of law. The first clause is a limitation on the power of the general assembly to levy a tax or create a corporate debt, or to authorize others to do so, but the latter clause is imperative, that the general assembly shall require all property within the corporation to be taxed for payment of corporate debts that have been created, and operates as an express authority to impose taxes to pay such debts, nor does it limit their power in the choice of the instruments for the purpose.

5. That section does not provide, that the legislature shall require such tax to be levied through the corporate authorities, but they may select the agents to levy and collect the tax for the payment of the debt. There is a broad distinction between the two clauses; the first only authorizes that body to confer power to levy taxes for corporate purposes, and to create a corporate debt; but the last clause fully empowers the legislature to cause taxes to be collected for the payment of corporate indebtedness when created. This provision of the law is not unconstitutional.

6. *TAXES—when unauthorized.* Under the 7th sec. of the act of 1869, it is unlawful to register bonds with the Auditor of State, until the railroad in aid of which they have been voted, shall be completed near or into the limits of the corporation, and cars are running thereon; and none of the benefits of the act can be claimed, unless the subscription or donation creating the corporate debt, was first submitted to an election of the legal voters within the corporation, under provisions of laws of the State, and a majority of the legal voters living therein were in favor of such aid, subscription or donation: *Held*, that where any of these requirements are wanting, the language of the act being imperative, the auditor has no power to make the assessment of the tax, and the courts will enjoin its collection.

7. *STATE CREDIT—to corporations.* The 38th sec. of art. 13 of the constitution of 1848, which prohibits the State from giving its credit to or in aid of any individual, or association or corporation, is not violated by levying and collecting such a tax as this. It is not declared to be a State tax; the auditor's certificate shows it to be a local tax, and for municipal purposes. The tax is levied on property in the township, and no portion is taken from the State revenue, general or special, to aid the railroad company, or to pay the debts of the township. It is not, directly or indirectly, giving the credit of the State in aid of this or any other road, individual or corporation. The fact that it was levied by the auditor, extended in the column of State taxes by the county clerk in the collector's books, was mere form, and in nowise changed its nature; and it, when collected, is kept as a separate fund, and applied to the local purpose for which it was collected. Hence, the levy of this tax did not violate the latter provision of the constitution.

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APPEAL from the Circuit Court of LaSalle county ; the Hon. EDWIN S. LELAND, Judge, presiding.

The opinion states the facts of the case.

Messrs. GLOVER, COOK & CAMPBELL, for the appellants.

Mr. OLIVER C. GRAY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a bill in chancery, filed by a number of tax payers, in the LaSalle circuit court, against the collector of Dayton township, in that county, to restrain the collection of a portion of the taxes extended against them on the collector's warrant. The bill alleges that the tax was levied under an order from the State Auditor, on the county clerk, to raise a fund to pay the interest on \$12,000 of bonds issued by the township, for stock in the Ottawa, Oswego & Fox River Valley Railway Company, which had been registered in the auditor's office. The bill alleges that the bonds were illegally issued by the town authorities, inasmuch as there was no registry of the voters prior to the election, and that a majority of the voters residing in the township, did not vote in favor of issuing the same ; that the bonds were not legally registered, and that the levy was largely in excess of the amount required to pay the interest due upon these bonds ; that the township officers alone have the power to levy such a tax ; and it was extended on the collector's warrant as a part of the State tax.

On the 28th of February, 1857, the general assembly adopted an act, authorizing certain cities, counties, incorporated towns and townships, to subscribe to the stock of certain railroads. The first section is as follows :

"SECTION 1. *Be it Enacted by the People of the State of Illinois, represented in the General Assembly, That any city,*
5—57TH ILL.

county, incorporated town, or any township now or hereafter organized under the township organization laws, which may be situated on or near the route of the Ottawa, Oswego & Fox River Railroad, or of the Chicago, Amboy & Upper Mississippi Railroad, or of the Joliet & Mendota division of the Joliet & Terre Haute Railroad, as the same may have heretofore, or may hereafter be surveyed and located, may become subscribers to the stock of any such road, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereon attached, under such limitations and restrictions and on such conditions as they may choose and the directors of said company may approve, the proposition for said subscription having been first submitted to the inhabitants of such city, town, county or township, and approved by them. And upon application of any fifty voters of any city, county, incorporated town or township as aforesaid, specifying the amount to be subscribed and the conditions of said subscription, it shall be the duty of the clerk of such city, town, county or township, immediately to call an election in the same manner that other elections for said city, county, town or township are called, for the purpose of determining whether said city, county, township or town will subscribe to the stock of said road; and if a majority of said votes shall be 'for subscription,' then the county court or board of supervisors having jurisdiction over county matters in said county, or the corporate authorities of said city or town, or the supervisors and town clerk of such township so voting, shall cause said subscription to be made, and upon its acceptance by the directors of said company, shall cause bonds to be issued in conformity with said vote, which bonds shall in no case bear a higher rate of interest than 10 per cent per annum, and shall not be of less denomination than one thousand dollars, and shall be accepted by said company at their par value."

Section four declares that, "It shall be the duty of the proper authorities of any city, incorporated town, county or

township, issuing bonds as aforesaid, to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon, and to levy such taxes as may be necessary therefor as other taxes are levied by them."

The election was held on the 17th day of April, 1869, at which the vote for subscription was taken, and a majority of those voting were in favor of the proposition. We have been referred to no law which repeals the act of 1857, and the election must have been held under its provisions. It being in force, and the election being held under it, we must look to its requirements to determine whether the election is legal and the bonds properly issued.

In the case of *The People ex rel. v. Dutcher*, 56 Ill. 144, it was held, that under the law of 1865, a registry was not required in a township election of this character; that unless otherwise expressed, the presumption is, that it was intended, when power is given to hold an election in a township, it shall be held in the same manner as other town elections, and as no registry of the voters is required, but is excepted for town meetings at which town officers are elected, the registry law does not apply to an election of this character. That case is decisive of this question. But if it was not, we are not prepared to hold that a failure on the part of the proper officers to make the registry, or the board of election to require each voter to make the required affidavit, would render the election void, or be ground for vacating the office of those elected, or for holding bonds thus voted and issued, and in the hands of innocent holders, void. The legislature has not so declared, even if that body possesses such power. It imposes a heavy penalty on any officer who shall wilfully violate any of the provisions of the law, but does not attempt to declare the election void.

It is next insisted, that a majority of all the voters residing in the township did not vote in favor of issuing these bonds. The act of 1857, we have seen, provides for calling the election, and declares that if a majority of the votes shall be for

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subscription, then the county, city, town or township, shall cause the subscription to be made, and the bonds to be issued. This provision evidently refers to the majority of the votes cast at that election, and not to the majority of the legal voters residing in the township. If such had been the intention, other and very different language would have been employed. We are clearly of the opinion that a fair and the only reasonable construction that can be given to this act, is that a majority of the votes cast at the election is sufficient. This election seems, so far as the bill discloses, to have been called in the mode required, by the proper authority, and to have resulted in favor of subscription.

It is also urged, that the amount of tax levied by the auditor is excessive, as it will produce an amount largely above the interest which fell due on the 1st of July, 1870. The auditor's certificate states that \$1.15 on each \$100 of valuation of the taxable property of the township, will be required to pay the interest becoming due on the 1st of July, 1870, on bonds issued by the township of Dayton, and registered in the auditor's office. There is no allegation that these \$12,000 of bonds, issued by the township, are all that are registered by the auditor. For aught that appears, there may be other bonds of the township, in an amount requiring all of this fund to pay interest then falling due, registered in the auditor's office. That officer does not say that the tax is levied to meet the interest on these bonds, but to pay interest on registered bonds. We can not presume that there are no other bonds so registered, and the bill fails to allege there are not others. This objection is not well taken.

It is next urged, that the auditor, under the constitution of 1848, could not be empowered to levy this tax, but that it devolved alone on the township authorities. The act of the 16th of April, 1869, (Sess. Laws, 318, sec. 4.) confers power upon the auditor, and it is made his duty to ascertain the amount of interest that will accrue upon the registered bonds of any county, township &c., and transmit a certificate, stating the

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estimated per centum required to meet such interest, and that per centum shall thereupon be deemed added to and a part of the per centum which may be levied for purposes of State revenue, and shall be so treated by the clerk, &c., in making such estimates, and books for the collection of taxes, and which shall be collected with the State revenue.

It is contended that this provision is violative of sec. 5, art. 9 of the constitution of 1848. The first clause of that section declares, that the corporate authorities of counties, townships, &c., may be vested with power to assess and collect taxes for corporate purposes. But the second clause is broader and more comprehensive. It declares, that "The general assembly shall require that all of the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts, contracted under authority of law."

It will be observed, that the first clause of this section only authorizes the general assembly to confer power upon such corporations, to levy a tax for corporate purposes. This has been held a limitation on the power of the general assembly to levy a tax or create a debt upon municipal corporations, or to authorize others to do so. That they might confer the power, but it was only with the citizens or the corporate authorities to determine whether they would incur the debt, or levy the taxes for corporate purposes. *The People ex rel. v. The Mayor of Chicago*, 51 Ill. 17; *Harward v. Levee & Drainage Co.* ib. 130 and other subsequent cases.

But it will be observed, that the second clause of this section is imperative upon the legislature, in requiring it to cause taxes to be levied upon the property within the corporation, to pay any indebtedness lawfully incurred by such body. This is an express authority conferred upon the general assembly, to cause to be levied a tax to pay such indebtedness. It is more; it makes it the duty of that body to cause such taxes to be collected. It gives them no option in the matter. Nor does it limit their power as to the instrumentalities that shall be employed. It does not require the levy for such purpose

to be made through the corporate authorities, but leaves the legislature free to select the agents who shall impose and collect the tax. Hence, it is seen, that there is a broad and palpable distinction between the first and second clauses of this section ; the first only authorizing the legislature to confer power on such corporations to collect taxes, for ordinary corporate purposes, and to create a corporate debt, while the last clause fully empowers the legislature to cause taxes to be levied to pay the debts of such bodies. And in the exercise of that power, they have required the auditor to levy the tax necessary to pay such indebtedness. These bonds having been legally issued, the auditor had power, under this law, to make the levy of the tax in controversy, and this provision of the law does not conflict with the constitution of 1848.

It is next urged, that the bonds were registered without authority of law.

The seventh section of the act of 1869, (laws p. 316.) declares that it shall not be lawful to register any bonds under the provisions of that act, or to receive any of the benefits or advantages to be derived therefrom, until after the railroad, in aid of the construction of which the debt was incurred, shall have been completed near to or in such county, township, city or town, and cars shall have run thereon ; and none of the benefits, advantages or provisions of the act shall apply to any debt, unless the subscription or donation, creating such debt, was first submitted to an election of the legal voters of the county, township, city or town, under the provisions of the laws of this State, and a majority of the legal voters living in the county, township, city or town were in favor of such aid, subscription or donation. The bill in this case alleges, and the demurrer admits, that the railroad to which this subscription was made, had not been completed near to or in the township, and cars had not been run thereon. And that at the election which voted this subscription, a majority of all the legal voters living in the township had not voted in favor of the proposition, but while there was a majority of the votes

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cast at the election, there were many less than a majority of all the legal voters living in the township.

A majority of the court hold, that the language of this act is imperative, and when it appears that these requirements of the statute are wanting, the auditor has no power to make the assessment, and that when the non-compliance with the statute appears, the court should grant relief; that the requirements of the statute are peremptory and that the acts it has prescribed are conditions precedent to the action of the auditor in estimating and certifying the tax to the county clerk, and that a non-conformity with these requirements of the statute having been alleged in the bill, the court below erred in sustaining the demurrer and dismissing the bill.

It is also urged, that this tax was levied and extended as State revenue, and was for that reason violative of sec. 38, art. 3 of the constitution of 1848, which prohibits the State from giving its credit to or in aid of any individual, association or corporation. This act does not, in terms, declare this a State tax. The auditor's certificate shows its purpose to be entirely a local tax, and for municipal purposes, being for the payment of interest on township indebtedness. The tax is levied on the property exclusively in the township, and no portion of the tax is taken from the State revenue, general or special, to aid the railroad company, or to pay the debts of the township. We fail to see that this tax, thus levied and applied, can be, in the remotest degree, regarded as giving the credit of the State in aid of this or any other road, individual or corporation, either directly or indirectly. It is but collecting a special tax, levied alone on the the property situated in a single township, to pay the interest on a debt created by the township. The fact that it was levied by the auditor, extended on the collector's warrant by the county clerk, in the column with the levy for State revenue, was mere matter of form, and in nowise changed its nature or purpose, and is, under the law, when collected, required to be kept separate from the State revenue, and applied to a local purpose. It is the substance, and not mere form or

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name, that changes things. But this tax is not even called State revenue, and we have seen that the general assembly has power to employ other agencies than the town officers, to levy such taxes.

We are unable to concur in the construction given to the seventh section of this act of 1869. The last clause of that section authorizes such bonds to be registered, when the affidavit therein specified, shall be filed. We think when that affidavit is filed, the registration may be made, and the tax levied and collected under that act, until the registration shall be arrested by an appropriate proceeding, to which the holders of the bonds thus registered are parties. There is nothing appearing from which it can be inferred that an affidavit was not filed, and we think it should be presumed it had been, until the contrary is shown.

For the errors indicated, the decree of the court below is reversed and the cause remanded.

Decree reversed.

JABEZ K. BOTSFORD

v.

CHARLES R. O'CONNER *et al.*

1. DESCENTS—*posthumous heir*. The true construction of our Statute of Descents, is, that a posthumous child inherits of an intestate father precisely as do his children born in his life time. On the death of a father, the title to his real estate vests in the posthumous child, although *in ventre sa mere*, precisely as though such child had been previously born.

2. SAME—*party to suit to divest title*. Such a child can not be divested of its title to lands thus inherited, by a proceeding in a court, unless made a party; nor will the form of action, whether in chancery, at law or under the statute, make the slightest difference. A person must have an opportunity of being heard before a court can deprive him of his rights, and this rule

57	72
124	485
57	72
136	133
57	72
153	903
57	72
158	494
40a	318
57	72
55a	317
57	72
66a	676
57	72
174	641
57	72
184	382
184	587
185	289
57	72
189	*121
57	72
209	*100

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applies equally to superior and inferior jurisdictions. Such a person, not having been made a party to the bill, his rights are not cut off by the decree, the sale or the administrator's deed, and he can recover from those claiming his title.

3. *SUMMONS—service—return.* The sheriff indorsed on a summons in chancery this return: "Served this writ on the within named Mary O'Conner and Charles R. O'Conner, the others not found in my county, the 26th day of August, 1858." *Held*, the return of service insufficient to confer jurisdiction of the persons of the defendants.

4. *SAME—return—what it must show.* The return of service must show it was served by copy, in chancery, or by reading, at law; it must show the time, the manner and upon whom served, and for the want of these particulars the court will fail to acquire jurisdiction. There must be a legal service, and it must appear from the return that it is such service as gives the court jurisdiction over the person of the defendant.

5. *SERVICE—finding of the court in decree.* When the court, by the decree, finds there was service, that, like any other finding of the court, can never be contradicted in a collateral proceeding, by parol or other evidence, outside of the record in that proceeding. It, however, may be by other portions of the same record. But such a finding is conclusive in a collateral proceeding, unless thus rebutted.

6. *SAME—presumptions in favor of.* Where a court of general jurisdiction has proceeded to adjudicate in a cause, it will be presumed that the court had evidence that there was such service or appearance as conferred jurisdiction of the person. The question is primary and must be first determined, but the presumption may be rebutted. If the same record shows insufficient service, and it fails to show the court otherwise acquired jurisdiction, then the presumption is rebutted, and it will be held the court acted on insufficient service. When the return appears in the record, and there is no finding of the court, from which it may be inferred that the court otherwise acquired jurisdiction, it will be held the court acted on the service appearing in the record.

7. *SAME—insufficient—a nullity.* Where service of summons is insufficient to confer jurisdiction, the decree as to the defendants is a nullity, and may be questioned in a collateral proceeding. Where service is by summons, parol evidence will not be heard to prove or to aid it. It is otherwise when the service is by publication.

8. *SAME—service defective.* The return in this case appeared in the record, and is defective, in not showing how it was made, and as parol evidence could not be received to aid it, it can not be presumed the court acted on other evidence than the return, and it rebuts the finding of the court that there was service.

9. *JURISDICTION—part of heirs—parties.* Although part only of the heirs of a deceased person are made parties to a proceeding to sell real estate

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to pay debts of the intestate, still the court will acquire jurisdiction of the subject matter, as the statute does not require all parties in interest to be before the court before it can acquire such jurisdiction. It is the death of the party seized of real estate, the grant of letters testamentary or of administration, his indebtedness, and filing the petition, which confer jurisdiction. It is necessary to make all persons in interest parties, that their rights may be adjusted, and it may be error not to do so, but that does not defeat the jurisdiction of the court. A decree in such a case is binding on the parties to it.

10. *ADMINISTRATRIX—guardian.* When the administratrix was also guardian of the heirs, whose property she applied for leave to sell, such fact, if illegal, would not prevent the court from acquiring jurisdiction, and the fact that she, as guardian, was not made defendant, if erroneous, did not go to the jurisdiction.

11. *NOTICE—administrator's sale.* The omission of an administrator to re-advertise the property for an adjourned sale, does not render the sale void. The 106th section of the Statute of Wills imposes a penalty for failing to comply with the statute, in making such sales, but declares such omission shall not be sufficient to defeat the sale.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The facts sufficiently appear in the opinion.

Mr. GRANT GOODRICH, for the appellant.

Messrs. ROSENTHAL & PENCE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The undisputed facts in this case are, that Charles O'Conner, being seized in fee of the premises in controversy, died on the 1st of March, 1858, intestate, leaving, surviving him, a widow and two minor children. His widow was then *enceinte*, and was afterward delivered of a female child, which was named Ann O'Conner, and who, not then being born, was not made a party with the other heirs to a proceeding subsequently had for the sale of the real estate of intestate, for the payment of

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his debts. On the 4th day of March, 1858, Ann O'Conner, the widow, was appointed administratrix of the estate, and she, at the same time, became guardian of Charles R. and Mary O'Conner. On the 26th of August, 1858, and before the birth of the posthumous child, the administratrix filed a petition in the county court of Cook county, praying the sale of the lands of which intestate died seized, to pay the debts which had been proved and allowed against his estate, in which proceeding Charles R. and Mary, together with two tenants, who were in possession of a portion of the lands, were made defendants. A summons was issued, upon which the sheriff indorsed this return: "Served this writ on the within named Mary O'Conner and Charles O'Conner, the others not found in my county, the 29th day of August, 1858."

On a hearing, a decree was rendered, ordering the sale of these premises, with others, on the 16th of September, 1858, by which decree the court found that the two minor children, Mary and Charles R., were all the legal heirs which intestate left surviving him, and ordered the administratrix to sell all the right, title and interest, which was of intestate at his death, and which descended to Charles R. and Mary O'Conner. The decree required a report of proceedings thereunder before executing deeds after the sale.

There is nothing to show that Ann O'Conner, the posthumous child, was in any manner referred to, or made a party to that proceeding. A supplemental proceeding was had in the case at the next March term of the court, but the posthumous child was not then made a party. On the 1st day of June, 1859, and after the birth of this child, the property was advertised for sale, on the 18th day of July, 1859, when a portion of the property named in the decree was sold, but the property in dispute was not sold until the 25th of the following October, the sale having been several times adjourned. The sale was reported to and approved by the court. A deed was, thereupon, made to the purchaser, from whom appellant, through *mesne* conveyances, derives title. Appellees instituted a suit in

ejectment in the Superior Court of Chicago, against appellant for the premises. A trial was had, resulting in favor of appellees, and the record is brought to this court by appeal, and various errors are assigned.

The question, whether the posthumous child took, by descent, as did the brother and sister, or only as heir to the property which might remain after payment of all debts of intestate, we regard as fully settled by the cases of *Detrick v. Migatt*, 19 Ill. 146, and *McConnel v. Smith*, 39 Ill. 279. In those cases, which were the same, differently presented, it was held, that under our Statute of Descents, a posthumous child inherited of an intestate father precisely as did those who were born in his life time; that on the death of the father, the title to his real estate vested in the posthumous child, although *in ventre sa mere*, precisely as though such child had been previously born. And those cases further hold, that such a child can not be deprived of its rights to lands so inherited, by a proceeding in court, unless made a party. Nor do we conceive that the form of action, whether in chancery, at law, or under the statute, can, in this respect, make the slightest difference.

It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard, before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right.

This is coeval with the common law, and lies at the very foundation of our jurisprudence, whether chancery, common law or statutory, and applies equally to superior as well as inferior jurisdictions. This child was born about a year before the sale was made, and every opportunity was afforded for making it a party, and thus cutting off its rights to this

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inheritance, but, from inattention or other cause, it was not done. Not having been made a party to the bill, the rights of this posthumous child were not affected by the decree, the sale or the administratrix's deed, and it had a right, under the evidence in the record, to recover. Was the service on Charles R. and Mary sufficient to give the court jurisdiction of their persons, so as to render a decree under which they could be divested of their title to this property? The return is, "served this writ on the within named Mary O'Conner and Charles R. O'Conner, the others not found in my county, the 26th day of August, 1858." This return fails to state how the writ was served; whether by copy, by reading, by posting notice or otherwise, does not appear.

To give the court jurisdiction of the persons of defendants, a legal service upon them is necessary. The mode of service of summons, when not otherwise provided by statute, is by reading the same to the defendants, and to each of them, and the return should show the time when, upon whom, and the manner in which, service was made, and unless it thus appeared, the court failed to acquire jurisdiction. *Ball v. Shattuck*, 16 Ill. 299. And in the case of *Belingall v. Gear*, 3 Scam. 575, it was held that it must affirmatively appear, from the officer's return, that there was a legal service, and that it was such service as gave the court jurisdiction over the person of defendant.

But appellant contends that the decree cures the defective service; that it recites that it was shown to the court that due service of process was had upon the two minor defendants, and that the decree can not be contradicted by the summons and return. It is undeniably true, that this, like any other finding of the court, can never be contradicted in a collateral proceeding, by parol, or other evidence outside of the record in that proceeding. It, however, may by other portions of the same record. But such a finding is conclusive, in a collateral proceeding, until thus rebutted.

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In the case of *Clark v. Thompson*, 47 Ill. 25, we said: "It is, however, insisted that when a court of general jurisdiction has proceeded to adjudicate a cause, we must presume that the court had evidence that there was such service, or appearance, as confers jurisdiction of the person; that the question of jurisdiction is primary, and must first be determined. This is no doubt true, in all collateral proceedings, but is liable to be rebutted. If the record shows service which is insufficient, and the record fails to show that the court found that it had jurisdiction, then the presumption is rebutted, and it must be held that the court acted upon the insufficient service. When a summons and return appear in the record, and there is no finding of the court from which it may be inferred that there was other service, or appearance, it will be presumed that the court acted upon the service which appears in the record. In this case, the summons and acknowledgment of service, were not sufficient to confer jurisdiction over the minor defendants, and unless jurisdiction was otherwise obtained, the decree, as to them, was a nullity, and may be attacked in a collateral proceeding."

This is directly to the point, and fully embraces this question, and must be held to govern it.

The return of service being insufficient, we must hold that the court below had no jurisdiction of the persons of the minor heirs, against whom this summons was issued and the decree rendered.

Where the service is by summons, verbal testimony can not be received, to prove or aid it. That can be shown alone by the officer's return. It is no doubt otherwise where service is by publication, when parol evidence may be received to prove that the notice was published.

The service appearing in the record was defective in not showing the manner in which it was made, and as parol evidence could not be rightfully heard to aid it, we can not presume the court acted on other evidence than the return. It therefore rebuts the finding that there was service.

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Appellant insists that the court below did not, and could not, acquire jurisdiction of the case, because only a part of the heirs were made parties. We do not understand the statute as requiring all persons in interest to be made parties, to confer jurisdiction of the subject matter upon the court. The court acquires that jurisdiction, from the death of the party seized of real estate, the grant of letters testamentary or of administration, and his indebtedness, and filing the petition showing these facts. These are facts which confer jurisdiction upon the court, as to the subject matter. The necessity of making all persons in interest parties defendant, is to adjust their rights. Although clearly erroneous, the court would, in a proper case, calling for the sale of property of a decedent, acquire jurisdiction, and the decree would be binding on the parties to the decree, in a collateral proceeding, if only a part of the heirs were brought before the court. But as to those not parties to the proceeding, it would have no binding effect in any court, whether attacked directly or collaterally, and the fact that the administratrix was also guardian, if illegal, should have been objected to when the case was before the county court.

The failure to make the guardian a defendant, may be an error, but it can not be held to be necessary to the jurisdiction of the court because he is not made a defendant, and the omission is not objected to in the court below. We can not hold that the court thereby failed to acquire jurisdiction over those properly in court.

It is next insisted, that there should have been a new advertisement after each adjournment of the sale, and failing to give the notice required by the statute preceding the adjourned sale, that no title passed by the deed executed by the administratrix.

This sale is governed by the provisions of the Statute of Wills. The 106th section (Gross' Com. 820,) prescribes the notice that shall be given, the time it shall be published, and its various requirements of the time, place and terms of the sale. It imposes a heavy penalty on the administrator,

for a failure to comply with the Statute of Wills, in making such sale. But the same section declares that such an omission shall not be deemed sufficient to affect the validity of the sale. This provision was, no doubt, designed to cure this character of omission. Where the court, rendering the decree, has proper jurisdiction, the sale should not, under this section, be held void because the administrator has omitted some requirement, such as a defective or insufficient notice of the sale.

We are, therefore, of opinion, that the objection in regard to the notice is unavailing.

The judgment of the court below must be affirmed.

Judgment affirmed.

The above opinion was filed at the September term, 1869, and at the September term, 1870, a petition for a rehearing was filed, which was granted. The case was argued at that term, and subsequently the following opinion was filed in the case:

Per CURIAM: A rehearing was granted in this case and further arguments were heard, and after carefully reviewing the grounds of the decision previously announced, and giving to the questions involved much reflection, a majority of the court have arrived at the same conclusion. We, therefore, adhere to the former decision and opinion then announced.

The judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE SCOTT delivered the following separate and dissenting opinion:

In view of the importance of many of the questions involved in this case, I deem it proper to state my views at length upon them, as well where I concur as where I dissent from the view expressed in the majority opinion of the court.

The appellees claim title to the premises in question, as heirs at law of Charles O'Conner, deceased, and the appellant claims title to the same property, under certain *mesne* conveyances from the purchaser at an administratrix's sale of said property, to pay the debts of the said decedent. The important question involved in the case is, whether the proceedings had in the county court pass the title of the heirs to the property in controversy, to the purchaser at the administratrix's sale. The answer to this inquiry involves two questions, arising upon the state of the facts presented in the record. First, did the county court have jurisdiction to make the order of sale, on the 16th day of September, 1858, under which the premises were afterwards sold to the grantor of the appellant? Second, what effect did the birth of the posthumous child, Ann O'Conner, born after the order of the sale was made, and before the premises were actually sold under the order of the court, have upon the sale? And herein is involved the further inquiries: first, what estate does a posthumous child take in the lands of the ancestor? and, second, were the rights of the posthumous child, in this case, affected by the sale, if it was in all things regular as to the other heirs?

The terre-tenants entered their appearance in the county court, but it is objected that the court did not have jurisdiction over the persons of the minor defendants, Charles R. and Mary.

The return on the summons issued is in the language following: "Served this writ on the within named Mary O'Conner and Charles R. O'Conner, the others not found in my county, the 26th day of August, 1858. John L. Wilson, Sheriff, by S. Miles, Deputy."

Manifestly, this return is defective, in not showing the manner of the service. No other substantial objection can be taken to the return. The date shows, with sufficient accuracy, the time of the service, and the fact that the writ was served by a deputy, in the name of a sheriff, is lawful. It is a defective service alone in not showing the manner, whether by reading or by copy, in which the writ was served. The decree

finds, that the petitioner shows to the court that due service of process was had on Mary and Charles R. O'Conner.

In a collateral proceeding like this, will the finding of the court, that due service of process was had, be deemed sufficient evidence of that fact, or will it be presumed, against the solemn finding of the court to the contrary, that the court acted on the defective service?

Cases illustrative of the one at bar have frequently been before this court, and it is believed that when the decisions bearing on this question are examined, it will be found that they are entirely consistent with one another. It will be found that they are in harmony with the policy of the law in this and other States, where the common law prevails, to maintain the jurisdiction of the court, where parties have acquired property rights under its judgment or decree, until the contrary is made to appear. This rule is founded on considerations of public policy, and was established for the protection of purchasers on the faith of judicial process.

I will briefly notice the cases that have been passed upon by this court.

The case of *Wilson v. Greathouse*, 1 Scam. 174, to which the attention of the court has been called, is not in point on the question under consideration. It was a case that originated before a justice of the peace, and the return of the officer did not show the date of the service, the constable who served the process being dead. The rule is there laid down, that if the court does not have jurisdiction of the parties, its proceedings are *coram non judice*. Nor is the case of *Ogle v. Coffey*, 1 Scam. 239. That was on error to reverse a judgment rendered on default, where the return neither showed the date or manner of service, and it was held bad for that reason.

The case of *Ball v. Shattuck*, 16 Ill. 299, was a direct proceeding. The return was defective, in not showing how the summons was served. The case simply holds, that the mode of service, when not otherwise provided for by statute, is by

reading, and the return must show the time when, and on whom, the service was made.

The case of *Pardon v. Dwier*, 23 Ill. 572, was an action of ejectment. The defendant claimed title under a deed made in pursuance of a judgment rendered before a justice of the peace, a transcript of which had been filed in the office of the clerk of the circuit court. The record recited that the summons was "returned, duly served by reading to the defendant." When the return was produced, it read "duly served by reading, June 16, 1848." It was held that the transcript of the justice, or rather the record, was sufficient, *prima facie*, to show a proper return of service, but that it was not conclusive, and might be contradicted by the return itself, and that when the return was shown, it did contradict the statement in the record, and showed what had often been held to be an insufficient service to give the justice jurisdiction. I am unable to see how the return in this case, when produced, contradicted the finding of the court. It was entirely consistent with the finding, but not to the same extent. The decision, however, can be supported upon a different ground. It was the finding of a court of inferior and limited jurisdiction, and no liberal intendments are ever made in favor of its jurisdiction.

The sufficiency of the service in *Maher v. Bull*, 26 Ill. 348, was questioned on an appeal, and is not pertinent to the present inquiry. The case simply holds that a return, where the officer states that he served the writ by explaining the contents to the defendant, and that he accepted service, was not sufficient.

In *Clark v. Thompson*, 47 Ill. 25, the decree of the circuit court was attacked collaterally, as in the present case. The service was manifestly insufficient to confer jurisdiction. The court say: "if the record shows service which is insufficient, and the record fails to show that the court found that it had jurisdiction, then the presumption" (that is, in favor of the jurisdiction of the court) "is rebutted, and it must be held that the court acted upon the insufficient service." That case can clearly be distinguished from the one now before the

court. In that case, there was no finding of the court from which it could be inferred that there was service, and, therefore it was held that the court must have acted on the defective service. Not so in this case. Here the court found that it was shown that due service of process was had.

In *Reddick et al. v. The State Bank*, 27 Ill. 145, the court modified, to some extent, the rule stated in *Randall v. Songer*, 16 Ill. 27, and in *Vairin v. Edmonson*, 5 Gilm. 272, and say, "it is to be presumed that no court will state of record the existence of facts which had no existence, or pass a decree, or render a judgment, unless proof of service or notice were actually produced. The record, therefore, stating such facts, and nothing to the contrary appearing, it should be received as evidence of their existence."

In *Banks v. Banks*, 31 Ill. 162, service was acknowledged by defendant, on the back of the summons, and it was objected that there was no evidence in the record that it was the genuine signature of the defendant; but the decree recited that it appeared to the court that process had been duly served on the defendant. The court there approved the principle of *Timmerman v. Phelps*, 27 Ill. 496, and say: "this finding, as in that case, is conclusive, unless the defendant, on a motion to set aside the default, would show the court unadvisedly found the fact."

In *Rivard v. Gardner*, 39 Ill. 125, it was objected, that the return of the sheriff on the summons, did not show the date of service, and, *non constat*, that the court had jurisdiction to pronounce a decree at the time it did so. But the decree recited that the defendants were duly served, and on the authority of *Banks v. Banks*, *Reddick v. The State Bank*, and *Timmerman v. Phelps*, this recital in the decree was held to cure the defect in the return, and the court say, "although the return was without date, we must suppose the court was satisfied, in some legitimate mode, that the service was in season."

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In *Moore v. Neil*, 39 Ill. 256, it was objected, that the notice was defective in not stating the first and last days of publication, as the statute required. The decree, however, recited that "it appearing to the court that notice, according to law, was given, of the pendency of this cause." It was held that this recital in the decree was sufficient evidence that the proper notice had been given. The court approve the cases of *Gibson v. Roll*, 27 Ill. 92, and *Goudy v. Hall*, 36 Ill. 319, and say, "although the certificate of the printer was defective, yet we must presume, from this recital, that the court received other evidence of the date of publication."

The case of *Miller v. Handy*, 40 Ill. 448, is a well considered case, and, on the authority of *Reddick v. The State Bank*, and *Goudy v. Hall*, the court say, "the record, therefore, stating the fact of the return of two *nihils*, and nothing to the contrary appearing, must be held *prima facie* evidence, at least, of the existence of that fact, and there is nothing in the case to show that the finding of the court was not in strict accordance with the fact."

The case of *Russell v. Brown et al.* 41 Ill. 183, is to the same effect, and is in harmony with all the cases on this question.

It will be observed that there is a marked distinction preserved in all the cases, where the decree or judgment of the court is assailed on error or on appeal, and where the same is attacked in a collateral proceeding. This distinction explains the apparent conflict in some of the cases.

There are errors which can only be reviewed by an appellate court. Courts not having appellate jurisdiction, have no power to revise the errors of a court of general jurisdiction. Where a court of general jurisdiction has found the existence of a fact, such finding, in all collateral proceedings, must be regarded as having been correctly found, until the contrary is made to appear. The reason for the rule is this: On the inspection of such proceedings, collaterally, we can only see what the court has done, and not whether it has proceeded erroneously, or found incorrectly, according to the proof before it. In the

case before the court, the circuit court found that there had been due service of process on certain of the defendants, and nothing appears in the record to show that the court found incorrectly.

A judgment, irreversible by a superior court, can not be declared a nullity by any authority of law; if it has been rendered by a court of competent jurisdiction of the parties, the subject matter, with authority to use the process it has issued, it must remain the only test of the respective rights of the parties to it. *Voorhees v. The Bank of the United States*, 10 Peters, 400. Under any other rule, there would be no stability to judicial proceedings, or security for purchasers at judicial sales.

The jurisdiction of the county court, in all matters within its jurisdiction, is general and unlimited. In matters pertaining to the settlement of estates, that court is a court of general and original jurisdiction, and when acting on subjects within its jurisdiction, as liberal intendments will be made in its favor as in favor of the jurisdiction of the circuit courts. The general presumption will be indulged, and in all cases it will be presumed to have acted within its jurisdiction, until the contrary is made to appear. *Propst v. Meadows*, 13 Ill. 157.

The return of service in this case is entirely consistent with the finding of the court, but not to the same extent. The officer returns that he has served the writ upon the within named Mary and Charles R. O'Conner, and the court found that it was shown that due service of process was had. There is nothing in all the record to show that the court found, unadvisedly or incorrectly, on this jurisdictional fact. It was the province of the court to determine whether it had jurisdiction of the persons of the defendants in that proceeding, and that question it did determine, and recorded its solemn finding and judgment. Upon the authority of *Reddick v. The State Bank*, *supra*, the record stating such fact, and nothing to the contrary appearing, it should be received as evidence of the existence of that fact.

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It would be a hard rule of law, indeed, that would require that a purchaser at a judicial sale should himself determine, with entire accuracy, and at his peril, whether the court that pronounced the judgment or decree, found correctly on the facts necessary to confer jurisdiction. Such a rule would deter all prudent men from becoming purchasers at judicial sales.

In the case of *Voorhees v. The Bank of the United States*, *supra*, the court said, "it would be a well merited reproach to our jurisprudence, if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of court, should not have the same protection under an erroneous proceeding, as the party who derived the benefit accruing from it. A purchaser, under a judicial process, pays the plaintiff his demand on the property sold; to the extent of the purchase money he discharges the defendant from his adjudged obligation. Time has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from controverting the absolute right of the plaintiff to the full benefit of his judgment, and it shall not be permitted that the purchaser shall be answerable for defects in the record, from the consequences of which the plaintiff is absolved. Such flagrant injustice is imputable neither to the common nor to the statute law of the land. If a judgment is reversed for error, it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution only of the money. The purchaser shall hold the property sold, and there are few, if any, States in the Union which have not consecrated this principle by statute."

Consistently with the adjudged cases in this court, and in harmony with the uniform current of authorities, as I understand them, I hold that, from the finding of the court, it was shown that due service of process was had, and nothing to the contrary appearing, that the court had jurisdiction of the persons of the defendants, Charles R. and Mary O'Conner.

I will now consider, briefly, the remaining questions involved in the case :

First. What estate does a posthumous child take in the lands of its ancestor?

By the statute (Gross' Comp. 808, sec. 70,) it is provided that in all cases, where a person shall die intestate, leaving estate, real and personal, in this State, and a posthumous child shall be born unto him after his death, such child shall come in for its just proportion of the estate, in all respects, as though it had been born in the life time of the intestate.

It is insisted by the appellant, that such child does not inherit like a child living at the death of the parent, but its interest is limited to its "just share," which is only what remains after payment of debts. I do not think the statute will bear that construction. It is the duty of courts to so interpret the statutes as to do equal and exact justice to all parties, if, in doing so, no violence is done to the language used. It would be much more equitable to hold that the terms used in the statute, "shall come in" for its "just proportion," mean that such a child shall inherit, in equal proportion, and in like manner, with children born in the life time of the common parent. And that is the plain and obvious meaning of the statute. It has been twice so held by this court. *Detrick v. Migatt et al.*, 19 Ill, 146; *McConnel v. Smith*, 39 Ill. 278.

In the case of *Detrick v. Migatt*, it was held, that the posthumous child takes the estate by force of the statute, directly from the parent, with the same effect as if in being at the death of the parent.

And, second: Were the rights of the posthumous child, in this instance, affected by the sale?

To my mind, there is more seeming difficulty in this question than in any other one in the whole case, and yet I think it is capable of solution on well known and well established principles of law.

It is an elementary principle, that before a party can be deprived of his interest in an estate by the judgment or decree either of a court of law or equity, the court that assumes to

Separate opinion: SCOTT, J.

pronounce the judgment or decree, must have jurisdiction both of the subject matter of the suit, and of the person of the party whose interest is to be affected. I know of no exception to this rule in all the range of judicial proceedings. It applies alike to all courts, whether they are of general or statutory jurisdiction. It is difficult to conceive how a rule, so essential in all jurisprudence, can ever be relaxed or dispensed with, in a given case.

The effect of what we are asked to say is, that this posthumous child's inheritance is cut off and effectually barred by a sale under a decree of a court, to which it was in nowise a party. It was born within the usual period of gestation, after the death of the parent, and more than a year before the order of sale was executed. Upon the birth of the child, its just proportion of the estate vested instantly, and although ample opportunity was afforded for making it a party to the proceedings had in the county court, and thus cutting off its rights in this inheritance, yet from inattention, or other cause, it was not done.

I am unable to distinguish this from the case of *Detrick v. Migatt*. The same principle was involved, and no reason is perceived why that case does not control this one.

We are reminded that courts have said, that a purchaser at a judicial sale need not concern himself about the errors of the court. That is true only where the court has jurisdiction of the subject matter, and of the person of the party by service of process, or where it will be presumed, from the findings of the court, that it had jurisdiction of those whose interests are to be affected by the sale. If the court has not such jurisdiction, then its whole proceedings are *coram non judice*, and the purchaser takes nothing under the sale. It was so held in the case of *Wilson v. Greathouse*, above cited. The converse of this rule is undoubtedly true, that if the court has such jurisdiction, though it proceeds irregularly and erroneously, still the purchaser will be protected. It has always been the policy of the law to protect purchasers at judicial sales; but in our

efforts to do so, we must do no violence to the plainest principles of our jurisprudence.

The case of *McPherron v. Cunliff et al.* 11 Sergt. & Rawle 422, is certainly the strongest case to which our attention has been called, and yet we do not think that it fully sustains the position assumed by the counsel for the appellant. In that case, the ancestor, when he came to this country, left in Ireland a lawful wife and heirs. After his arrival here, he was secretly married to a woman, and children were born unto him. On his death, letters of administration were regularly granted on his estate, and a proceeding was instituted in the orphan's court, to sell the real estate of the decedent, to which all his children, by the last marriage, were made parties—no others were then known to exist. The estate was sold, under the order of the court, and the purchasers went into possession of the same. Twenty years after the sale, it was attacked, collaterally, by one of the illegitimate children, in this wise. He went to Ireland, and there purchased the title to the premises of the true heirs, and then instituted his suit.

Much stress is laid by the court on the iniquitous conduct of the plaintiff. With the title thus purchased of the legitimate heirs, for a nominal sum, he undertook to attack a sale to which he was himself a party, and which was made, in part, for his own maintenance when a minor. The court held, that upon all principles of justice, and especially after the lapse of so great a period, he was both legally and equitably estopped from asserting such a title, to maintain which he must necessarily prove himself a bastard, and dishonor his own father and mother. There is great force and justness in the reasoning of the court on that point.

It is true, however, the court say, in that case, that such a sentence as they were then considering, is definitive; that it passes *in rem judicatum*; that the proceeding is purely *in rem* against the estate of the intestate, and not *in personam*. And to support this view, they liken it to a condemnation of

Syllabus.

goods in a court of exchequer, whose condemnation is final, in an action to try the right to the goods.

I can not say that the analogy will hold good. The proceeding, under our statute, to sell the real estate of an intestate to pay debts is not purely a proceeding *in rem*. Parties in interest are necessary thereto, by the positive provisions of the law. To hold that such parties are not necessary, under our law, would be to blot out and obliterate the statute.

The heir, in the case before us, asserted her right in apt time. No fraud or *laches* can be imputed to her. The court never had any control over her person, by the service of any process, nor is there any finding of a court that it had jurisdiction.

I, therefore, concur in the majority opinion of this court, in holding that the interest of the child, Ann O'Conner, was in nowise affected by the proceedings had in the county court, for the sale of the real estate of the intestate.

Mr. JUSTICE SHELDON : I concur in the foregoing opinion of Mr. Justice Scott.

WILLIAM H. GLAZIER

v.

JACOB STREAMER.

57	91
186	443
57	91
69a	319

1. PLEADING—*before justices of the peace*. Although not strictly formal, a plea of non-assumpsit, sworn to, and not objected to by the plaintiff, will put in issue the execution of a promissory note in a justice's court.

2. PLEADING AND EVIDENCE. It is error in the circuit court to admit a note in evidence, when its execution is thus denied, without proof that it was executed by the defendant.

Syllabus. Opinion of the Court.

3. **SAME.** Where there was no evidence of the execution of the note sued on, but an admission by the defendant of the genuineness of a note not identified as the note in controversy, and where the evidence strongly tended to support the defense that the note was obtained by fraud and circumvention: *Held*, that it was error to instruct the jury that defendant was estopped to deny the execution of the note, and that the jury should not consider any evidence to that effect, in making their verdict.

4. **PROMISSORY NOTE—*fraud and circumvention.*** Where the evidence shows a promissory note was obtained by fraud and circumvention, and the defendant had used due diligence when the note was obtained, the defense is complete.

WRIT OF ERROR to the Circuit Court of Livingston county ;
the Hon. CHARLES H. WOOD, Judge, presiding.

The facts of the case appear in the opinion.

Messrs. BEATTIE & ROBINSON, for the plaintiff in error.

Mr. S. E. PAYSON, and Messrs. BUSHNELL & AVERY, for the defendant in error.

Mr. JUSTICE McALLISTER delivered the opinion of the Court :

Streamer sued Glazier, in justice's court, upon a promissory note, alleged to have been made by the latter to one Johnson, and by him assigned to the former before maturity. Glazier contending, as appears by the evidence, that he never executed the note, and that its execution was obtained by fraud and circumvention, used by Johnson in a patent right transaction, filed in justice's court what was evidently intended as an affidavit denying the execution of the note sued on; but instead of its being a direct denial, it was in the form of the usual plea of *non assumpsit*, sworn to be true in substance and fact.

An appeal was taken to the circuit court, and this form of affidavit was filed in that court, with the transcript of the justice. With the affidavit remaining on file in the cause, and without any motion to strike it from the files the parties, went

Opinion of the Court.

to trial. The court permitted the plaintiff to introduce the note in evidence, without proof of its execution, and against the objection of the defendant; and also instructed the jury, in substance, that the defendant was estopped from denying the execution or signing of the note in controversy, and that no evidence to that effect should be considered by the jury, in arriving at a verdict.

The evidence in behalf of the defendant below, tended strongly to support the defense, that the execution of the note was obtained by fraud and circumvention. Indeed, the only evidence in rebuttal, was the testimony of the justice as to an admission made by the defendant to him out of court, in respect to the genuineness of a note, when no note was exhibited to him.

In *Palmer v. Manning*, 4 Denio R. 131, where the evidence to prove the making of a promissory note, purporting to be signed by the defendant, was, that the plaintiff's agent called on the defendant with the alleged note in his pocket, but which he did not exhibit, and told him he had a note for that amount against him which he wanted payment of for the plaintiff; and the defendant said he had given such a note, and would pay it, if the plaintiff would make a small deduction, and indulge him as to time; but it was held by the court, that the note produced on the trial was not identified with that to which the admission referred, and the evidence of such confession alone, was not sufficient to submit to a jury to pass upon the question, whether the defendant executed the note produced. See also *Shaver v. Ehle*, 16 Johns. R. 201.

The justice's testimony, as to Glazier's admission, was not sufficient to base a verdict in favor of the execution of the note, even if that testimony was unexplained. But it was explained, and satisfactorily shown, that Glazier had no reference to the note sued on, because he did not know of its existence.

We are of opinion, that the ruling of the court was fatal to a defense which might otherwise have been successful.

Syllabus.

The mode of denying the execution of the note, was not only competent, but usual, in original actions brought in the circuit court; and, though not strictly proper in justice's court, yet, as the plaintiff went to trial without moving to strike the plea and affidavit from the files of the circuit court, he should not have been permitted to disregard it upon the trial.

Upon the undisputed facts shown by the defendant, the jury would have been warranted in finding that the execution of the note was obtained by fraud and circumvention, used by the payee, and if they had also found, from the circumstances, that Glazier used due diligence, according to the principle of the case of *Leach v. Nichols*, 55 Ill. 273, the defense would have been complete.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

57 94
22a 263

NATHAN H. JAMISON

v.

WILSON M. GRAHAM.

1. **FORCIBLE ENTRY AND DETAINER**—*possession of plaintiff*. In this form of action, two questions must arise, first, as to the exclusive possession of the plaintiff, and second, the invasion of his possession by the defendant.

2. Where there was evidence tending to show both plaintiff and defendant used the premises jointly, as a pasture, it was error in the court to instruct the jury, that the plaintiff might recover, if he was in possession, without reference to defendant being also in possession. The instructions should have informed the jury that plaintiff, to recover, should have had exclusive possession.

3. **JURY**—*should find the facts*. It is erroneous for the court, in instructions, to assume that facts are proved, but they should leave the jury to find the facts. It is error in the court, by instructions, in such case

Syllabus. Statement of the case.

to prevent the jury from finding, on the evidence, as to whether there was a joint possession.

4. **FORCIBLE ENTRY**—*when maintainable*. To maintain an action of forcible entry and detainer, it is not necessary that the plaintiff should have a *pedis possessio*; it is sufficient, if the premises are used and occupied for some useful purpose; but if such possession is joint, as to different persons, neither one would be entitled to the exclusive possession.

5. **JOINT TENANTS**—*exclusive possession by one*. Even if one joint tenant could maintain this action against another, who has taken exclusive possession, still that could not apply to a case where the parties occupy the premises jointly, and one party seeks to recover the entire premises, to the exclusion of the other. One joint tenant can not recover the exclusive possession of the premises against his co-tenant.

APPEAL from the Circuit Court of Henderson county; the
Hon. ARTHUR A. SMITH, Judge, presiding.

This was an action of forcible entry and detainer, brought by Wilson M. Graham, before a justice of the peace of Henderson county, against Nathan H. Jamison, to recover the possession of the south-east quarter of section 17, township 12 north of range 4, west of the 4th principal meridian. On a trial before the justice, plaintiff recovered judgment, and the defendant appealed to the circuit court of Henderson county, and a trial was had in that court, by the judge and a jury, at the March term, 1869, when the jury found a verdict in favor of plaintiff. Defendant, thereupon, entered a motion for a new trial, which was overruled by the court, and judgment was rendered on the verdict. The defendant brings the case to this court on appeal, and assigns various errors.

Mr. CHARLES M. HARRIS, for the appellant.

Messrs. GOUDY & CHANDLER, for the appellee.

MR. JUSTICE THORNTON delivered the opinion of the Court :

This was a proceeding to obtain the possession of lands where the entry was alleged to have been forcible.

Both parties, together with other persons, owned land adjoining the land in dispute, and the latter was inclosed by means of the fences of the several owners. The alleged entry was occasioned by a fence, erected between the land of appellee and the disputed land, by appellant.

The evidence tends to show, that the land in controversy was used as a common pasture, and that appellee did not have exclusive possession. There is some proof that the parties had a joint possession, with other persons.

We shall not notice the testimony further, as the judgment must be reversed, for instructions given and refused.

Two questions were to be determined by the jury: the exclusive possession of appellee, and the invasion of his possession by appellant.

The land was not cultivated, but used entirely for pasturage.

For recovery, the appellee should have had the sole control. The first and third instructions, given for him, exclude the idea of a common pasture; and authorized the jury to find for plaintiff below, even though defendant may have had the right to use the premises. From the evidence, these instructions should have informed the jury that they must believe that the plaintiff had the exclusive possession, against the defendant.

The third and fourth instructions for the plaintiff, assume possession in plaintiff, and the fourth assumes defendant's knowledge of the extent of such possession, instead of permitting the jury to believe such facts, from the evidence.

The seventh instruction, for the plaintiff, told the jury that certain acts indicated an intention to appropriate the land to useful purposes, and to reduce the same to possession. This, the jury should determine. By such charges, the court arrogates the power of the jury, and virtually dispenses with a jury trial.

Syllabus.

The principal error of the court, both in giving and refusing instructions, was, that the jury were deprived of the right to decide as to the joint possession of the parties. There was evidence from which this might be inferred.

There need not be *pedis possessio* to support this action. It is sufficient if the premises are used and occupied for useful purposes. *Pearson v. Herr*, 53 Ill. 144. If such occupation was joint, as to different persons, neither one would be entitled to the exclusive possession.

It is contended, in argument, that one joint tenant, who unlawfully and forcibly excludes his co-tenant, is liable in this action. This principle, if correct, is not involved in this case. Appellee seeks to recover the possession of the entire premises. He claims the use of the whole, and not a part of the pasture. If the parties had a joint right, this would be inconsistent with the exclusive use, by either, without an agreement between them. It would be absurd, to hold that one joint tenant can deprive his co-tenant of all participation in a common right.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE WALKER took no part in the decision of this case.

ISAAC R. STOWELL

v.

HELEN BEAGLE.

57	97
135	164

1. PLEADING AND EVIDENCE. In an action of slander, for charging the plaintiff with having committed fornication, and the plea of justification averred that plaintiff had been guilty of fornication, without averring any time, it was error in the court to restrict the proof of her having committed fornication.
7—57TH ILL.

Syllabus. Opinion of the Court.

mitted fornication to two years before the words were spoken by defendant. The plea not being limited as to time, the proof should not have been. Proof of the truth of the plea without reference to when the act was committed, was pertinent to the issue, and should have been admitted.

2. It was improper to admit evidence of the fact that there was a prior personal difficulty between defendant and the father of plaintiff, as it did not tend to prove actual malice against the plaintiff, and was not pertinent to the issue.

8. Where the plea of justification set up the fact that the plaintiff had been guilty of fornication, it was error to instruct the jury that to maintain the plea the defendant must prove the words charged were true, on the grounds that plaintiff, although an unmarried woman, was guilty of fornication, and had been delivered of a child, and it was necessary that such alleged facts, constituting the justification, should be proved by clear and satisfactory evidence, and if not so proved, the defense would fail. Nothing being in the plea in regard to the plaintiff's having been delivered of a child, the instruction was too broad, and should not have been given. Such an instruction was well calculated to mislead the jury.

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. BENNETT & VEEDER, HANNAMAN & KRETZINGER, and BURNS & BARNES, for the appellant.

Messrs. FROST & TUNNICLIFF, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action for slander. The first count in the declaration laid the charge of slander as follows:

That the defendant, on or about the 14th day of September, 1868, "did falsely and maliciously speak and publish of and concerning said plaintiff, of and concerning a charge of fornication, and thereby intending to charge the plaintiff with having been guilty of said crime of fornication, and then and there intended that said people, and said Mrs. Spidle, who then and there heard of said charge, should so understand the

Opinion of the Court.

defendant, and who then and there did understand said defendant, the false, scandalous, malicious and defamatory words following, that is to say, 'She (meaning plaintiff,) looks to be in the family way,' (meaning and intending thereby that said plaintiff was pregnant with child,) as much as my wife does. That is the story, and I (meaning defendant) believe it to be so.' 'She (meaning plaintiff) looks to be in a family way as much as my wife does. That is the story, and I believe it to be so.' Meaning thereby then and there to charge the plaintiff, being and always having been an unmarried woman, had been guilty of, and was guilty of, the crime of fornication, and was pregnant with child."

The three other counts were substantially the same, varying the charge of the words spoken somewhat, but the averment in the inducement of each was the same, as to what the defendant intended to charge the plaintiff with, and the same innuendo was stated in each.

The plea of the general issue was filed, as also a plea of justification, alleging that the plaintiff, before the time of the speaking of the words, "to wit: On the 14th day of September, A. D. 1868, and the 1st day of September, A. D. 1868, at and within the said county of Knox, had been and was guilty of fornication, and at and before the speaking and publishing of the words as aforesaid, had had sexual intercourse with a male person, and that at the time of the speaking and publishing of the words in the declaration mentioned, the said words were true." Upon which issues were joined. On the trial, defendant offered to prove specific acts of fornication committed at any time prior to September 14th, 1868. The court held the inquiry must be restricted to some reasonable limit, viz: two years, and refused to allow the general inquiry, without some restriction as to time.

The substantial imputation, which the declaration charged the defendant to have made upon the plaintiff, was that of having committed fornication. The innuendo ascribed that meaning

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to the slander ; the plaintiff could not reject it at the trial, and resort to another meaning, that the act was committed within a limited time. The innuendo gave a character to the slander, which became part of the issue. The plea of justification was, that the act had been committed generally, without any limit as to time. The days named in the plea, under a *videlicet*, were not material, so as to confine the defendant to them.

The proof offered by the defendant was pertinent to the issue, in the form in which it was made up between the parties, and should have been admitted ; the defendant should not have been restricted in his proofs to the limit of two years.

We think, too, there was error in admitting, against the objection of the defendant, the testimony of the witnesses French, Thomas Beagle and Terwilliger, as to a prior personal difficulty between the defendant and Thomas Beagle, the father of the plaintiff, and the existence of hostile feelings between them.

The evidence should be confined to the issue, in order that the attention of the jury may not be distracted, by a variety of questions, from that which is the subject of their inquiry. If the evidence was admitted to show actual malice in the defendant towards the plaintiff, that could not be inferred from personal difficulties, or hostile relations between the defendant and her father, even though she was a member of his family.

We think, too, there was error in giving this instruction to the jury, at the instance of the plaintiff, to-wit :

“ In order to enable the defendant to sustain his justification by proof that the words charged are true, on the ground that the plaintiff was guilty of fornication, and that she was delivered, though an unmarried female, of a child, it is necessary that such alleged facts, constituting the justification, should be proved by clear and satisfactory evidence, and if not so proved, the defense on that ground fails.”

Syllabus.

The having been delivered of a child was no part of the plea of justification. From the instruction given, the jury might well have been led to suppose, that unless the defendant had proved that the plaintiff had been delivered of a child, his justification was not made out. Such an instruction should not have been given.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE WALKER dissents.

ELLEN McCANN *et al.*

v.

JOHN W. DAY.

1. **RIGHT OF WAY**—*notice of*. Where a party purchased a right of way, and received a written instrument to evidence the fact, and both sides of the way were fenced, and it was in constant use by him, for the purposes of a way, although the writing was not recorded, these facts constitute such notice to a subsequent purchaser as to prevent him from holding the right of way.

2. **EQUITY**—*injunction*. In such case, equity has jurisdiction, as the injured party has no adequate remedy at law, and will perpetually enjoin such purchaser from obstructing the right of way.

APPEAL from the Circuit Court of Will county; the Hon JOSIAH McROBERTS, Judge, presiding.

The opinion states all the facts necessary to an understanding of the case.

Messrs. URI OSGOOD & SON, for the appellants.

Messrs. GOODSPEED, SNAPP & KNOX, for the appellee.

57 101
34a 167

57 101
142 116
144 641

57 101
149 571

57 101
160 175

57 101
178 36

57 101
186 *898
57 101
192 *484

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

On the 20th day of March, 1850, one Taylor owned the N. E. of the N. W. of section 15, township 36 north, range 10 east, and also held a bond from one Daggett, for the forty acres lying west of the above described tract, and for a tract of about thirty-five acres, lying east of said tract, and extending to the DesPlaines River. On that day Taylor sold to Day, the complainant herein, his interest in the west forty, held under Daggett's bond, and also a right of way from a public highway, known as the Chicago road, eastward along the north line of so much of his own forty as lay east of the Chicago road, and along the north line of the thirty-five acre tract, to the DesPlaines River. The Chicago road runs north and south, about three rods west of the west line of the thirty-five acre tract. Day paid the balance due Daggett, and received from him a deed for the west forty, and for a right of way along the north line of the thirty-five acre tract. There was a public highway running along the north line of Day's forty, and of so much of Taylor's forty as lay west of the Chicago road, and terminating in the Chicago road.

Thus Day, by his purchase from Taylor, and the subsequent deed from Daggett, acquired a right of way from his farm to the river. The instrument, executed under seal by Taylor to Day, purported to assign and transfer, not merely a right of way along the north line of the thirty-five acre tract held under bond from Daggett, which, by itself, would have been entirely inaccessible and useless to Day, but also a right of way from the Chicago road, which would pass for three rods along the north line of Taylor's forty, before striking the northwest corner of the thirty-five acre tract.

After the death of Taylor, his administrator, under an order of court, sold the forty acres originally owned by Taylor, and also the thirty-five acre tract acquired by him from Daggett,

to one Matthewson, who immediately conveyed to one Fitzpatrick. In both these deeds, a road-way was reserved on the north line of the thirty-five acre tract, but, undoubtedly, through inadvertence, the reservation was not extended along the three rods on the north line of the forty, to the Chicago road.

In 1865, Fitzpatrick sold to Ellen McCann, and in 1868, she fenced across the road-way next to the Chicago road, thus obstructing Day's access to the river, which was very important to his farm, as he had no living water on his land. Day thereupon filed his bill to enjoin her from obstructing his right of way, and the court, upon the final hearing, made the injunction perpetual.

There was no error in this decree. For a valuable consideration, Day had acquired from Taylor, a right of way across the three rods. It is true, the instrument showing the sale was not recorded; but Fitzpatrick, who was the real purchaser at the administrator's sale, the deed being first made to Matthewson as a matter of convenience, was fully notified of Day's claim when he received his deed. He also had constructive notice, the road-way having been left outside the fence, on the north line of the farm, from the Chicago road eastward. Fitzpatrick rebuilt the fence from the Chicago road to the river, a part of the distance laying a stone wall. There was also a fence on the north side of the right of way, built by one Sisson, and Day continued in the constant use of this lane, to the time when Ellen McCann bought. He had purchased, and was the owner of the easement. His recorded deed, from Daggett, showed him to be the owner of the right of way along the north line of the thirty-five acre tract, which would have been inaccessible to him, unless he could pass over the three rods on the north line of the forty, and the fact that the lane across the three rods, was openly and constantly used by him, as a part of the right of way, and that it was fenced out for that purpose, was certainly constructive notice to Ellen McCann, when she bought from Fitzpatrick, of whatever right of way

Syllabus.

Day might legally have over the three rods. This right was perfect under his contract with Taylor.

Objection is taken to the jurisdiction of a court of chancery, but in such a case as this, there is no adequate remedy at law. 2 Story's Eq. Jur. secs. 925, 926.

The decree is affirmed.

Decree affirmed.

JAMES E. CONKLIN *et al.*

v.

JOHN H. FOSTER.

57	104
138	498
38a	498

57	104
139	641
143	379

57	104
197	48

57	104
206	538

57	104
218	1286

1. **HOMESTEAD—title—lease.** The benefits of the homestead law are not confined to an ownership in fee, but attach to the house and lot to which the debtor has such a term as may be sold on execution. The object of the statute, is to protect the owner and his family in a home, free from sale under judgment or decree; and a tenant for years is as clearly within the reason of the statute, as the owner of a larger estate. The statute was designed to protect estates liable to sale on execution or decree, and a term for years is such an estate. The owner of a term for years, is an owner to that extent.

2. **SAME—attachment—execution.** A tenant for years, owning a house on the premises, and occupying it with his family, has a right to hold it free from levy and sale under an attachment or execution, and a purchaser, at such a sale, acquires no title thereby.

3. **SAME—sale of by debtor.** The owner of a homestead, although a judgment debtor, may sell and convey his homestead, and the purchaser will take the title free from any lien of the judgment, as property thus situated is not liable to levy and sale, and no lien of a judgment attaches to it.

4. **SAME—sale to a junior judgment creditor.** Where the judgment debtor, owning and occupying a homestead, sells the property to a junior judgment creditor, the purchaser takes the title free from the lien or claim by sale under execution by a senior judgment creditor. A sale of such property under an execution being inoperative, the purchaser thereat takes no title.

Syllabus. Opinion of the Court.

5. **LEASE—improvements thereon.** A house erected upon ground held under a lease, is annexed to and forms a part of the leasehold estate. The house is not, of itself, a separate chattel, but it, with the lease on the ground, forms a chattel real; and not being naturally divisible, it is not regular for the officer to sever the house from the term to which it is annexed.

6. **IMPROVEMENTS—severance from the fee.** A sheriff has no power to levy on and sell houses, timber or ornamental trees, and sever them from the fee.

7. **EQUITY—cloud on title.** Although a sale of the house, situated on leased ground, owned and occupied as a homestead, under an execution, confers no title, still it being a cloud on the title, equity will take jurisdiction to remove the cloud, especially when the purchaser under the execution, is in possession, and threatens to remove the house, and thus commit waste.

8. **SAME—rents.** The court, having acquired jurisdiction for other purposes, will proceed to do complete justice, and, in such case, give rents against the purchaser under the execution, for the time the property was occupied by him.

APPEAL from the Superior Court of Chicago.

The opinion states the facts of the case.

Mr. GEORGE SCOVILLE, for the appellants.

Mr. PERKINS BASS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a bill in chancery, filed in the Superior Court of Chicago, by appellee against appellants. The purpose of the bill was, to enjoin appellants from removing, selling or disposing of a house, therein described, and from letting any person into possession; that the house be decreed to appellee; that appellants surrender the possession to him, and that they be decreed to pay him a reasonable rent, as a compensation for the use of the same.

It appears, from the bill, answer and proofs, that, on the 10th day of March, 1868, appellee was the owner, in fee, of a lot of land in Chicago, and about that time, leased it to one John

Opinion of the Court.

H. Spencely, for the term of five years, which would have expired on the 10th of March, 1873; that Spencely entered into possession, and erected on the lot a frame house. It appears that he, with his family, remained in the occupancy of the house, until the 28th of April, 1869; that Spencely, with his wife and child, resided in and occupied the house, as a homestead; that, on the 1st day of September, 1868, while Spencely and his family were thus occupying the house and lot, appellants commenced a suit at law against him and another person, and caused an attachment to issue against Spencely's property, and levied the same on the house, but Spencely did not surrender possession to the sheriff, but continued to occupy it as a home for himself and family. That Spencely, on the 25th of September, 1868, still occupying the house, with his family, sold and assigned his interest in the lease to the Chicago and Lyons Stone and Lime Company, for the consideration of \$1,280, and the company then became the tenant of and attorned to appellee, and Spencely thereby became the under tenant of the company.

It also appears that on the 28th day of April, 1869, the company sold the house and appurtenances, and surrendered the term to appellee, for the consideration of \$875; that Spencely still continued to occupy the house as his homestead; that on the 29th day of April, 1869, the possession of the lot and house was surrendered to appellee, and he entered into the sole and peaceable possession of the same, and so continued until the 6th of the following May, when he leased it to one Thatcher for one year, and he entered into possession.

About the 18th of July, 1869, the sheriff levied an execution, issued on a judgment rendered in the attachment suit, on the house, and Thatcher thereupon left the house, and the sheriff sold it under the execution and levy, to appellants for the sum of \$400, and delivered them the possession which they had continued. And appellants had offered to pay a reasonable ground rent, and had said that if appellee refused to accede to reasonable terms they would be compelled to remove the

Opinion of the Court.

house. It was stipulated that all matters and things alleged in the bill, not specifically denied by the answer, should be taken as true, and it is under this stipulation that a portion of these facts are stated as appearing in the case. On a hearing, the court below granted the relief sought by the bill, and decreed to appellee \$282, for rent of the premises while occupied by appellants. To reverse this decree, the record is brought to this court by appeal, and errors are assigned.

Was the house liable to sale on the execution, or was it protected under the homestead law?

In *Deere v. Chapman*, 25 Ill. 610, it was held, that the benefits of the homestead law were not confined to an ownership in fee, but attached to the house and lot upon which it was situated, if the debtor had such a term as could be sold on execution. The object of the statute was to protect the owner and his family in a home, free from sale under a judgment or a decree, and a tenant for years falls as clearly within the reason of the statute as the owner of a larger estate. It was designed to embrace all estates liable to such sales, and a term of years being subject to a forced sale, under a judgment or decree, should be protected by the statute. *McClurken v. McClurken*, 46 Ill. 327. A debtor holding a term of years, is the owner to that extent. It, then, follows that this house and lot were not subject to the attachment, or levy and sale under the execution, and the purchaser acquired no title to it. It has been repeatedly held that such a purchaser could acquire no title. *White v. Clark*, 36 Ill. 285; *Moore v. Titman*, 33 Ill. 358; *Booker v. Anderson*, 35 Ill. 66; *Mooers v. Dixon*, 35 Ill. 208; *Silsbee v. Lucas*, 36 Ill. 462. And the claim may be set up after a sale under judgment or decree, unless released as provided by the statute.

In the case of *Green v. Marks*, 25 Ill. 221, it was held, that a judgment debtor might sell and convey his homestead, and the purchaser would take the property free from any lien of the judgment; that property thus situated was not liable to levy and sale on execution and no lien attached to it. Again,

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in *Bliss v. Clark*, 39 Ill. 590, it was held, that a sale of the homestead by a debtor to a junior judgment creditor, with a surrender of possession to the purchaser, would hold against a sale on an execution in favor of a prior judgment creditor, who recovered his judgment and made his sale while the premises were occupied by the debtor and his family as a homestead.

The sale under the execution being inoperative, the purchaser took nothing, and the judgment debtor was not estopped from selling his lease to whomsoever might purchase, and conferring on him such title as he had, unaffected by the sale on execution. It follows, that the Chicago & Lyons Lime and Stone Company became the owners of the lease and the house; appellee succeeded to their rights by his purchase from them, and appellants have no claim to the premises, so far as this record discloses.

Again, the house was annexed to and formed a part of the leasehold estate. It was not, of itself, a chattel, but, it with the lease of the lot, formed a chattel real. Being part and parcel of the same thing, and not naturally divisible, it was irregular for the officer to levy on the house, without also levying on the lease. Unexplained, it will be presumed to be unauthorized. We are aware of no case, or any principle, which holds that houses may be severed from the fee, the freehold or other estate, by an officer acting under an execution. It could not be, that growing timber, fruit or ornamental trees, could be severed from the fee, by a levy and sale on an execution against the owner of the fee.

Although the sale under the execution conferred no title, still it operated as a cloud on appellee's title, and appellants being in possession and threatening to remove the house, which would have been waste, we think the court had jurisdiction to restrain the assertion of their claim and to prevent the threatened waste; and as the court had acquired jurisdiction for other purposes, it was proper to proceed to do complete justice, by allowing a reasonable sum for the use and occupancy of the house

Syllabus.

and lot. The sum thus found by the court, was not unreasonable. Perceiving no error in this record, the decree of the court below is affirmed.

Decree affirmed.

WILHELMINA VON KETTLER *et al.*

vs.

MADISON Y. JOHNSON.

57	109
161	75
57	109
184	883

1. **PLEADINGS—*demurrer*.** Where a plea justifies an imprisonment under an order of the county court, but the defendant admits that, as the attorney of a creditor of the estate, he procured the arrest and imprisonment, and attempts to set up in his plea the facts upon which the arrest and committal were made, the plea should show all the facts necessary to give the court jurisdiction, and such a compliance with the statute as justified the county court in issuing the attachment and ordering the committal.

2. **JURISDICTION—*inferior courts*.** A party, who pleads as a defense the order of a court of limited jurisdiction, and professes to set up the facts, must state such facts as show the court to have had jurisdiction of the subject matter and of the person of the parties. Where a court has such jurisdiction, he nor those who advise or execute his process, can be held liable for a trespass, although the proceedings may be irregular and erroneous. But if the magistrate did not have such jurisdiction, then he and those who advise and act with him, or execute his process, are trespassers. The county court has jurisdiction over the general subject matter of the settlement of estates—it is given by the statutes—to attach and commit for the refusal of an administrator to obey an order to pay money to a creditor.

3. Such a plea is defective, unless it shows that a writ of attachment was actually issued; a recital of an order for an attachment, is not sufficient. A party seeking to justify under a judicial writ, it should be set out in the plea in full, or by apt and proper description.

4. **PLEA—*setting up the statute to show authority to imprison*.** Where a plea attempts to show a compliance with the statute authorizing the imprisonment of an administrator for refusing to pay money to a creditor, when ordered, all the facts necessary to warrant the imprisonment should appear. To authorize the court to order the imprisonment of the administrator, it must first ascertain the amount of money in the hands of the administrator,

Syllabus.

belonging to the estate, and the amount of debts allowed against the estate, and, if sufficient, order the payment of the debts in full, and a plea of this character will be defective unless this is averred.

5. *SAME—county court—power to imprison.* Although the county court has power to imprison for the non-payment of a claim, under certain circumstances, it does not follow that the court may imprison for another cause. The court could not imprison an administrator for non-payment of a claim, when he has no money of the estate in his hands.

6. *SAME—averment as to debts and assets.* The averment that the only debt against the estate is that of the creditor whom the court ordered to be paid, and that the administrator had in his hands assets to a much larger amount, is not sufficient, as it does not appear whether the assets consisted of money, property or choses in action.

7. *SAME—demand of payment.* When the court made the order of payment to the creditor, he should have demanded payment of the administrator, and if not paid within thirty days from that time, then, and not till then, could the creditor move for an attachment; this seems to be a jurisdictional fact, and should be clearly averred.

8. *PLEADING—averments—general.* To avail of such a defense, it seems that, as the probate court is of a limited, but not inferior, jurisdiction, such a plea of justification need not set up the facts showing jurisdiction, but generally to have averred that the plaintiff was arrested and imprisoned by the sheriff, by virtue of a writ of attachment issued from the county court, on an order, lawfully made, when the presumption would have arisen that the court had jurisdiction to make the order and issue the attachment. It is a court of record, and has a general jurisdiction, of unlimited extent, over a class of subjects, and when acting in reference to them, the jurisdiction is as general as that of the circuit court, and as liberal intendments will be made in favor of its jurisdiction.

9. *COUNTY COURTS.*—County courts, when they attempt to enforce compliance with their orders, by imprisonment, should always act with caution, and strictly observe the requirements of the statute.

10. *SAME—enforcement of orders.* The power to enforce obedience to an order of court for the payment of money, by imprisonment, is the highest power known to the law, and a party, seeking such a remedy, can not be heard to complain if he be required to strictly pursue the law conferring authority thus to proceed.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The opinion states the facts of the case.

Opinion of the Court.

Messrs. MARVIN & HEMPSTEAD, for the appellants.

Mr. M. Y. JOHNSON, *pro se*.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of trespass, for false imprisonment, brought by the appellants, who are husband and wife, against the appellee, to recover damages for the arrest and imprisonment of the appellant Wilhelmina Von Kettler.

The declaration contains two counts. The first count is in the usual form, and alleges the imprisonment of the said Wilhelmina in the county jail of Jo Daviess county. The second count charges the defendant with having counseled, advised and procured the arrest and imprisonment, as stated in the first count.

To this declaration, the defendant filed three pleas: First, the plea of not guilty, upon which, issue was joined. The second plea is as follows, viz:

“And for a further plea, in this behalf, said defendant says, *actio non*, because, he says, that Wilhelmina Von Kettler, late Wilhelmina Karrman, while sole and unmarried, was duly appointed, by the county court of Jo Daviess county, Illinois, the administratrix of the estate of her late husband, George Karrman, deceased, about the 12th day of November, A. D. 1866, and duly qualified as such; and afterward, on the 3d day of June, A. D. 1868, she intermarried with one John H. Von Kettler; and afterward, to wit: on the 5th day of March, A. D. 1870, one Julius K. Graves recovered a judgment against them in the circuit court of said Jo Daviess county, as the administratrix of said estate of George Karrman, deceased, for the sum of \$3,238.65, to be paid in due course of administration; and afterward, to wit: on the 11th day of March, A. D. 1870, said Julius K. Graves filed a certified copy of said judgment in the county court of Jo Daviess county,

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and caused a citation to be duly issued out of and under the seal of said county court, directed to the administrator of said estate (which was duly served by the sheriff of said county) to appear at the said county court, at a regular term thereof, to be holden at the court house, on the 21st day of March, A. D. 1870, to answer the said Julius K. Graves in that behalf, and perform what the said county court might require in that behalf; and in obedience to said citation, this defendant avers, said Wilhelmina Von Kettler, administratrix, aforesaid, and John H. Von Kettler, her husband, did appear in said county court as therein named; and no cause to the contrary appearing to the court, it was ordered and adjudged by the said county court, that said administratrix, as aforesaid, pay to the said Julius K. Graves, or his attorneys, the amount of said judgment aforesaid, with the interest thereon from the rendition thereof, within thirty days from that date, and take a receipt therefor; and this defendant avers that afterward, to wit: on the 23d day of April, A. D. 1870, after more than thirty days had intervened, and demand from the date of said order of court aforesaid, this defendant, as one of the attorneys of said Julius K. Graves, filed an affidavit in said court, that neither the said Wilhelmina Von Kettler, administratrix, as aforesaid, nor John H. Von Kettler, her husband, or any person for them or either of them, had complied with said order of said county court, and paid said judgment, or any part thereof, as required by said order aforesaid, but neglected and refused so to do, and thereupon prayed that an attachment may issue against said delinquent administratrix, Wilhelmina Von Kettler, and John H. Von Kettler, her husband. This defendant further avers, the said county court ordered an attachment to issue to the sheriff of said Jo Daviess county against said Wilhelmina Von Kettler, administratrix as aforesaid, and John H. Von Kettler, her husband, to bring their bodies before said county court, at the term then holden, at the court house in said county, to answer for their contempt of court in not obeying the orders of said court aforesaid, in paying said judgment aforesaid; and

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this defendant further avers they were arrested by the said sheriff aforesaid, in obedience to the command of said attachment, and brought before the said county court of said Jo Daviess county. The said court, then and there having jurisdiction of the persons and subject matter thereof, and they and each of them failed to purge themselves of the contempt, or to show they or either of them had paid said judgment, or any part thereof, or in any way complied with said order of court, or shown any reason for their neglect and refusal to perform said order of court, duly entered of record as aforesaid, the county court then and there adjudged them guilty of contempt, and ordered the sheriff of said Jo Daviess county to take and imprison the said Wilhelmina Von Kettler, administratrix as aforesaid, and John H. Von Kettler, her husband, in the county jail, until they shall pay said money, according to the order of said county court aforesaid, or shall thence be discharged by due course of law; and this defendant further avers they were imprisoned by said sheriff, under and by virtue of said order of the county court aforesaid, until the 3d day of May, A. D. 1870, when they complied with said order of said court, and paid the money as they were required, under said order, and from thenceforth they and each of them were released and discharged; and this defendant avers this is the same supposed trespass and imprisonment mentioned in plaintiffs' declaration, and no other or different one; and this he is ready to verify, &c. Therefore, he prays judgment, &c."

The third plea is the same in substance as the second, except that it contains the additional averment, that "there were no debts against said estate, except the debt of the said Julius K. Graves, and that there were assets of said estate, in the hands of the said Wilhelmina Von Kettler and John H. Von Kettler, her husband, to the amount of more than \$10,000, and greatly more than would pay said judgment."

To each of said special pleas the plaintiffs filed a general and special demurrer. The court below held the pleas good, and

overruled the demurrer. The plaintiffs standing by their demurrer, judgment was entered for the defendant.

The judgment of the court, overruling the demurrer to the special pleas of the defendant, is now assigned for error.

The questions presented by this record, are important, and have received the careful attention of the court. The defendant confesses, by his special pleas, that he committed the trespasses complained of in the plaintiffs' declaration; that he, as one of the attorneys of the creditor of the estate of George Karrman, deceased, filed the affidavit for the writ of attachment, and procured the arrest and imprisonment of the administratrix and of her husband, but seeks to justify himself under the orders of the county court of Jo Daviess county.

The first important inquiry is, can this defendant shield himself under the proceedings of the county court of Jo Daviess county, as set out in the special pleas by him filed?

A party who pleads for his defense, the order or process of a court of limited and not general jurisdiction, must state such facts as will show that the court had jurisdiction of the subject matter of the controversy, and of the person of the party.

It is a clear and well defined rule of law, that when a magistrate has jurisdiction of the general subject on which he acts, and of the person of the party, neither he nor those who advise or execute his process, can be made liable, in trespass, for their acts, although the magistrate's proceedings may be erroneous and irregular. *Outlaw v. Davis et al.* 27 Ill. 467; *Flack et al. v. Ankeny*, Breese, 187.

But, if the magistrate has not such jurisdiction, then he and those who advise and act with him, or execute his process, are trespassers. *Gorton v. Frizzell*, 20 Ill. 291.

Let us test the case now before the court, by these well known principles. It can not be denied that the county court of Jo Daviess county had jurisdiction over the general subject on which it acted. Jurisdiction is amply conferred by the statute.

Opinion of the Court.

But we think these pleas are defective, in the averment of facts, to show a complete defense to this action. Both of these pleas are defective, in not averring that a writ of attachment was actually issued. They only recite that an order for an attachment was made by the county court. Where a party seeks to justify under a judicial writ, he should set out such writ in full, or by apt and proper description.

Again, these pleas are both defective in another respect.

They purport to state facts, in detail, to show that the county court had jurisdiction to make the order for the arrest of the plaintiffs, or in other words, that the court complied with the statute, so that the court might lawfully imprison the plaintiffs under the provisions of the 126th section of the Statute of Wills. (R. S. 562.) This they do not do. The power to imprison an administrator for the non-payment of a claim against the estate, is only conferred by statute. Before the court can properly make such an order, it must first ascertain the whole amount of moneys in the hands of the administrator belonging to the estate of the deceased, and the whole amount of debts established against such estate, and if there is sufficient money, to order the payment of the debts in full. Ample authority is conferred on the county court for this purpose, by the 123d and 124th sections of the same statute. This the county court did not do; at least, we are not advised by these pleas that it did. Because the county court may properly imprison an administrator for the non-payment of a claim against the estate, under a certain state of facts provided for in the statute, it does not follow that the court may imprison the administrator for another cause. It would be monstrous to hold that the county court could make an order on an administrator to pay a claim against the estate of his decedent, and then attach and imprison him for a non-compliance with such order, when he has no money in his hands with which to pay such claim.

The only averment on this point is contained in the second special plea, where it is averred that there were no debts owing

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by the said estate except that of the creditor, Julius K. Graves, and that the administratrix, Wilhelmina, had in her hands, belonging to said estate, "*assets*" to the amount of over ten thousand dollars. Of what these *assets* consisted, whether of money or personal property, or choses in action, the pleader does not disclose.

Another defect is apparent in these pleas. When the county court made its order for the payment of the claim of the creditor, Graves, it was his duty to demand of the administrator a compliance with the order of the court. (See section 126, above cited.) Thirty days must then elapse before the court can properly attach the party for a non-compliance with its order. The pleas in this case do not show distinctly that thirty days elapsed after the demand was made to pay the money, according to the order of the county court, and before the defendant made his application for a writ of attachment. This is a jurisdictional fact, and should be clearly and distinctly set forth. This the defendant has not done in either of his pleas.

It was, perhaps, unnecessary for the defendant to set out, in detail, all the facts required by the statute, to show that the county court could lawfully issue an attachment and imprison the plaintiffs, but having undertaken so to do, he must be required to set forth every material fact necessary to give the court jurisdiction.

The defendant might have pleaded, for his justification, the writ of attachment; that the plaintiff was arrested and imprisoned by the sheriff by virtue of the writ of attachment issued by the county court on an order lawfully made, and left the court to presume that the county court acted within its jurisdiction, until the contrary should be made to appear. In the case of *Propst v. Meadows*, it was held by this court, that the county court, although of limited, is not, strictly speaking, of inferior jurisdiction. It is a court of record and has a general jurisdiction of unlimited extent over a certain class of subjects, and, when acting within that sphere,

Opinion of the Court.

its jurisdiction is as general as that of the circuit court. When, therefore, it is adjudicating upon the administration of estates, over which it has a general jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of a circuit court. *Propst v. Meadows*, 13 Ills. 157.

We can not but remark, that when county courts attempt to enforce compliance with their orders for the payment of money, they should always act with due caution, and keep strictly within the authority conferred by the statute.

The power to enforce compliance with an order of court for the mere payment of money, by imprisonment, is certainly one of the highest powers known to the law; and the party who seeks to avail of this extraordinary remedy can not be heard to complain if the courts require him to pursue strictly the law conferring authority for such proceeding.

We think the circuit court erred in overruling the demurrer to the defendant's special pleas, for the reasons above suggested, and the judgment is reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE SHELDON, having heard this cause in the court below, took no part in its consideration.

JOHN H. VON KETTLER

v.

MADISON Y. JOHNSON.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

Messrs. MARVIN & HEMPSTEAD, for the appellant.

Mr. M. Y. JOHNSON, *pro se*.

Syllabus.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The questions involved in this case are substantially the same as those in the preceding one, and need not be discussed again.

The judgment is reversed and the cause remanded, with leave to the defendant to amend his special pleas.

Judgment reversed.

LOT S. PENNINGTON *et al.*

v.

JONATHAN F. COE *et al.*

1. SCHOOL TAX—*lien*. Where directors of schools employed a person to build a school house, and they levy a tax to pay therefor, and issue orders to the contractor on the treasurer for his pay, and he sells the orders at par to raise money to construct the building, the purchasers of such orders have the right to look to the tax thus levied for payment.

2. Where the people of the district vote to build a school house and locate the same, subsequent elections for borrowing money therefor, resulting in the negative, do not affect the validity of the result of the first election. The people may have been willing to be taxed for building a school house, and not willing to borrow money and pay ten per cent interest for the purpose.

3. School directors have the right to levy a special tax for school purposes without a vote, and a special tax for building purposes by a vote of the people; but they exceed their power when they attempt to appropriate the funds raised for a specific object to a different purpose. The holders of the orders had an equitable lien upon this fund, and the attempt to divert it to a purpose foreign to the express vote of the people, was a fraud and misapplication.

4. DECREE—*construction of*. Where the decree directed the treasurer to pay the sum due for building the school house, or so much or such part of that sum as may not be otherwise appropriated so in his hands, and the balance of the sum out of any funds in his hands, or that might come to his hands, belonging to the district, not otherwise appropriated: *Held*, the

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175 533

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treasurer would not be in contempt, under this decree, in refusing to pay to complainants all money expressly appropriated by law, and in refusing to pay, under the decree, funds obtained for the support and to defray the expense of schools.

APPEAL from the Circuit Court of Whiteside county; the Hon. W. W. HEATON, Judge, presiding.

The facts of the case are stated in the opinion.

Mr. J. E. MCPHERSON, for the appellants.

Messrs. DINSMOOR & STAGER, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The allegations in the bill, sustained by the evidence, show that one Henry Thomas completed a school house, according to contract, for the defendant school directors; that they had accepted the house, and delivered to him school orders, to the amount of \$1,100, in part payment; that a tax had been levied, in pursuance of a vote of the people, for building purposes, and collected and paid over to Pennington, the treasurer of the township; that the complainants were the owners of the school orders, having purchased them in good faith; and that the school directors and treasurer, after demand, refused to apply the money, thus collected, to the satisfaction of the orders, and claim the right to pay it on certain bonds for borrowed money, not then matured.

Appellees received the orders from Thomas, at their par value and paid, and agreed to pay, him for the same, to enable him to complete the building. They knew that a tax had been levied for building purposes, and had a right to rely upon the fund thus to be obtained, for payment.

There is no controversy as to the levy of the tax; but it is urged that it was done without the vote of the people, and hence in contravention of the school law. The exhibits show

Opinion of the Court.

that a vote was had on the 8th of January, 1864, and resulted in favor of building a school house, and in the location thereof. The tax was not levied until in 1868. In the interim a number of elections were held in the district, in regard to building school house and borrowing money. Whenever these were coupled, the vote was in the negative. These subsequent elections can not be construed to affect, change or abrogate the recorded vote of 1864. We can well conceive that the people might be willing to bear the burden of an annual tax, not to exceed three per cent, and yet be unwilling to borrow money at the rate of ten per cent interest, and in amounts which might be five per cent of the taxable property of the district. Gross' Stat. 1869, p. 697, sec. 47.

Directors have the right to levy a special tax for school purposes without a vote of the people, and a special tax for building purposes, with the consent of the legal voters; but they exceed their power, when they attempt to appropriate the funds raised for one object to a different object. Appellees had an equitable lien upon this fund, and the attempt to divert it to a purpose foreign to the expressed vote of the people, was a fraud and misapplication.

It is strongly insisted in the argument, that there is error in the decree in "requiring the treasurer to pay out not only the money raised by the special tax, but also any other money in his hands belonging to the district." The portion of the decree excepted to is not fairly presented in the argument. The language of the decree is: "It is therefore considered, adjudged and decreed by the court, that said Lot S. Pennington pay said sum of \$1,073.85, or so much or such part thereof *as may not be otherwise appropriated*, so in his hands as aforesaid, to said complainants on said school orders, and that he pay the balance due on this sum out of any funds in his hands, or that may hereafter come into his hands, belonging to said school directors of district 1, in said township 22 north, in range 7 east, *not otherwise appropriated*." All other moneys, which may come into the treasury, are specifically appropriated by express

Syllabus.

law, and the treasurer would not be in contempt of court in refusing to pay, under the decree, funds obtained for the support of schools and the defraying of the expenses of the same.

There is no error in the record, and the decree of the circuit court of Whiteside county is affirmed.

Decree affirmed.

RUSSELL C. MIX

v.

CHARLES M. ROSS *et al.*

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57	121
120	572
57	121
124	321
57	121
143	567

1. SPECIAL ASSESSMENTS—*whether collectible out of personal property.*

Where a city charter provides that all taxes and assessments shall be a lien upon the real estate upon which they are imposed, and on personal estate from and after the delivery of the warrant for the collection thereof until paid, and any personal property belonging to the debtor, may be taken and sold for payment of taxes on real estate, and all taxes and assessments, general and special, shall be collected by the collector, in the same manner and with the same powers as are given by law to collectors of State and county taxes: *Held*, that this provision only confers power on the collector to sell personal property for the payment of taxes; that taxes and assessments are a lien on real estate upon which they are imposed, and taxes are a lien on personal property.

2. Although the charter confers upon the city collector the same power to collect taxes and assessments as is possessed by collectors of State and county taxes, the general revenue laws expressly authorize the collection of such taxes from personal property, and that real estate shall not be sold for taxes while there is personal property, out of which it may be collected. And there being a plain distinction between a tax and an assessment, the one being a burden and the other an equivalent for the enhanced value of the property assessed, derived from the improvement: *Held*, that the general revenue law confers no power on the city collector, by the provision of the charter, to sell personal estate in satisfaction of any assessment.

3. STATUTES—*construction—taxes—assessments.* The act of the 1st of March, 1854, prescribing the mode of selling real estate, for the non-payment of taxes and assessments, makes a distinction between taxes and assessments, by making them distinct subjects of two sections.

Syllabus. Opinion of the Court.

4. When a statute gives a new power and also provides the means of executing it, those claiming the power can execute it in no other manner, and where power to make assessments is given, their payment can only be enforced in the method prescribed by the statute.

5. The charter having provided that on the non-payment of such assessments, the collector shall apply to the county court for judgment against the land, and that the court shall render judgment therefor and issue a precept to the sheriff to sell the land, makes it a proceeding *in rem*, and the only peril the owner incurs is the loss of his lot.

6. CORPORATION—*powers*. A corporation must show a grant, either in terms or by necessary implication, for all the powers it attempts to exercise, and especially so when it claims the right, by taxing or otherwise, to divest individuals of their property without their consent.

7. EQUITY—*jurisdiction*. In a case of this character, it is too late to raise the question of equitable jurisdiction, for the first time, in this court.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

The opinion states the facts of the case.

Messrs. PARKS & ANNIS, for the appellant.

Messrs. CANFIELD & NICHOLS, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill for an injunction, to restrain the city collector of Aurora from proceeding to sell a span of horses of the appellant, which said collector had seized and taken under and by virtue of a warrant issued to him for the collection of a special assessment of \$119, which had been made upon a lot of the appellant, in said city, as and for the special benefit which would be conferred upon said lot by the construction of a sidewalk in front of it. The court below, on motion, dissolved the injunction and dismissed the bill, and assessed damages on account of the injunction.

The only point we shall consider is, whether there was any legal authority to levy upon and sell personal property to pay this special assessment.

Parts of sections 4 and 7 in chapter 3, of the charter of Aurora, are relied on as conferring such authority, which read as follows:

“Sec. 4. All taxes and assessments, general or special, levied on or assessed by the common council under this act or the act to which this is an amendment, shall be a lien upon the real estate upon which the same may be imposed, voted or assessed, for two years from and after the corrected assessment roll shall have been confirmed, and on personal estate from and after the delivery of the warrant for the collection thereof until paid, and no sale or transfer shall affect the lien. Any personal property belonging to the debtor, may be taken and sold for the payment of taxes on real or personal estate.

“Sec. 7. All taxes and assessments, general or special, shall be collected by the collector or collectors, in the same manner and with the same power and authority as are given by law to collectors of county and State taxes.”

It is said that the first clause of sec. 4 specifically declares, that special assessments shall be a lien on personal estate, &c.; but that is to be read in connection with the second clause, which declares, that any personal property of the debtor may be taken and sold for the payment of *taxes* on real or personal estate. The word *assessments*, used in the preceding clause, is here dropped, and the mention that personal property may be sold for the payment of taxes, excludes the idea that it may be sold for the payment of assessments; only that is a lien which the personal estate may be sold to pay—so that the true reading of the first clause, taken together with the second, is, that all taxes and assessments, general or special, shall be a lien upon the real estate upon which they are imposed, and all taxes, shall be a lien on personal estate, &c.

It is again argued, that the collector of Aurora, having by its charter the same power and authority as the collector of State and county taxes, must have the right to levy upon

and sell personal property for this assessment, as the collector of State and county taxes is required by law to make the amount of a person's real and personal tax out of his goods and chattels; and that section 155 of the revenue act, Gross' Statutes, 594, provides, that personal property shall be liable for taxes levied on real property; and section 8 provides, that no real estate of any person shall be sold for taxes while personal property of such person can be found by the collector.

These are all provisions of law relating to taxes; but the assessment in question is not a tax.

There is a plain distinction between *taxes*, which are burdens or charges imposed upon persons or property to raise money for public purposes, and *assessments* for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement. *Sharp v. Speir*, 4 Hill, 76.

In *Canal Trustees et al. v. The City of Chicago*, 12 Ill. 403, it was held, that the exemption of the canal lands and lots from "taxation of every description," by and under the laws of the State, did not extend to a special assessment for widening an alley into a street, in Chicago; and the exemption was held to apply only to taxes levied for State, county and municipal purposes. The act of March 1, 1854, prescribing the mode of proceeding to sell real estate for the non-payment of taxes and assessments, takes the distinction between taxes and assessments, in making them distinct subjects of two separate sections; the first section providing, that, "in all cases where taxes assessed on real estate, by the corporate authorities of any city or town, are not paid," &c.; the second section providing, "in all cases where assessments, made by the corporate authorities of any town or city, on any lot or real estate in such town or city, for the purpose of improving any street," &c., are not paid, &c. Gross' Statutes, 121.

It is a rule that when a statute gives a new power, and at the same time provides the means of executing it, those who

claim the power can execute it in no other way. When we find a power to make the assessments, their payment can be enforced in the method directed by the statute, and not otherwise. *Andover & Medford Turnpike Corporation v. Gould*, 6 Mass. 44.

The only mode that we discover to be provided by statute, for enforcing the collection of this assessment, is that pointed out in the second section of the statute above cited, by application to the county court for judgment against the lot for the amount of the assessment, and that the county court shall render judgment against the lot for the amount of the assessment and issue its precept to the sheriff, commanding him to sell the lot, or so much thereof as may be necessary, to pay the judgment. It is a proceeding *in rem*, and the only peril to which the owner of the lot is exposed, by the non-payment of the assessment, is the loss of the lot.

A corporation must show a grant, either in terms or by necessary implication, for all the powers which it attempts to exercise ; and especially must this be done when it claims the right, by taxing or otherwise, to divest individuals of their property without their consent. *Sharp v. Speir*, *supra*.

What was said in *Higgins v. The City of Chicago*, 18 Ill. 276, as to a lien for an assessment being created on the personalty, from the delivery of the warrant to the collector, we take to have been with reference to a special provision in the charter of the city of Chicago.

No question appears to have been raised in the court below, as to the jurisdiction of a court of chancery in this case, and it is too late to raise it for the first time here.

The decree of the court below is reversed and the cause remanded for proceedings in conformity with this opinion.

Decree reversed.

JOHN S. MILLER *et al.*

v.

GEORGE G. McMANIS.

1. **PLEADINGS—*stipulation—waiver of want of issues.*** Where the parties at the trial in the court below stipulated that either party might offer any legal evidence as to the actual state of accounts between them, on issues of fact made up in the cause, so as to have a trial on the merits, without reference to questions as to the form of such pleadings, or form of action, or defense: *Held*, that it waived the demurrer to a portion of the pleas and dispensed with the necessity of having issues of fact formed on them. On the trial under this stipulation the court could admit all evidence that could have been under formal and well drawn pleas, and the court was not governed by the pleas on file.

2. **EVIDENCE—*bar of former judgment—different parties.*** In a suit between two persons, a judgment between other parties than those to the action pending can not be used as a bar to a recovery, nor can such a judgment between the same parties be so used unless the former suit was for the identical same cause of action, and the same breaches sued for in the action being tried.

3. **PLEA of former recovery—*evidence under.*** A plea of former recovery is not sustained by the record of a judgment on an agreement of a different date, nor is such evidence admissible because of the variance. Nor can the record of a judgment on an agreement entered into in 1864, be read in evidence, under a plea of former recovery, to an action on contracts entered into in 1863 and 1866. This proof is variant and does not sustain the plea.

4. **AGREEMENT—*performance.*** Where parties agree upon the terms of a contract which is to be reduced to writing but never was, and the parties on one side avail themselves of the benefits of the proposition, and go on under this agreement as though it had been in writing, the parties acting under it, and receiving all the benefits of the agreement, can not be heard to say that it was understood between them that the contract was not to be binding unless reduced to writing. Having availed themselves of all the benefits of the contract, they must be bound by its provisions.

5. **VERDICT—*excessive.*** Where the agreement was to pay the plaintiff a certain sum for each machine sold in certain territory named, when the money should be collected for which such machines were sold, it was error to instruct the jury that they might allow such sum for each machine sold outside of the territory named when collected, and the jury having acted under the instruction and allowed such sums, the verdict was excessive, and a new trial should have been granted.

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Syllabus. Statement of the case.

6. VERDICT—*where regular.* Where two suits between the same parties are consolidated into one, it is not error in the jury, trying the consolidated suit, to render but one verdict, and if it had been, still the objection was waived by failing to make any objection to it in the court below.

APPEAL from the Circuit Court of Bureau county; the Hon. EDWIN S. LELAND, Judge, presiding.

George G. McManis brought two suits in debt, in the Bureau circuit court, against John S. Miller and Jacob Chritzman. The alleged ground of recovery was for the use of a patent right, which plaintiff held for the manufacture and sale of the "Luper Patent Corn Cultivator," in the counties of Bureau, Knox, Henry and Stark, in this State. The claim was based on two separate contracts, the first a written, and the second a verbal contract.

Plaintiff only claimed to own the patent right for these counties. By the terms of the first contract, plaintiff was to receive five dollars for each machine sold in the spring of 1864, and six dollars for each machine sold in 1865 and 1866. Under the verbal contract, he was to receive two dollars for each machine manufactured and sold in these counties during the season of 1867.

These suits were subsequently consolidated into one. On the trial this stipulation was entered into by the parties:

"It is agreed in this cause, that either party may offer any legal evidence as to the actual state of the account between plaintiff and defendants on the issues of fact made up in said cause, so as to have a trial on the merits of said issues, without reference to questions as to the form of such pleadings or the form of action or defense, saving to plaintiff, that no evidence is to be offered as to matters heretofore excluded by the court and saving to defendants the right to traverse any breach of said contract not already traversed by them."

A trial was had by the court and a jury, and the jury returned a verdict against the defendants for the sum of

\$1200 debt. Defendants thereupon entered a motion for a new trial, which the court overruled and rendered judgment on the verdict. They thereupon prayed and perfected this appeal.

Messrs. ECKELS & KYLE, for the appellants.

Messrs. HARVEY & TRIMBLE and Mr. GEORGE S. PADDOCK, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

It is first urged, that the court below erred in rendering judgment while the demurrer was undisposed of to defendants' tenth and eleventh pleas. On the trial in the court below, the parties entered into this stipulation :

"It is agreed in this cause, that either party may offer any legal evidence as to the actual state of the account between plaintiff and defendants on the issues of fact made up in said cause, so as to have a trial on the merits, on said issues, without reference to questions as to the form of such pleadings or the form of action or defense, saving to plaintiff that no evidence is to be offered as to matters heretofore excluded by the court, and saving to defendants the right to traverse any breach of said contract not already traversed by him."

This stipulation obviated the necessity of settling the pleadings in the case. It authorized either party to introduce any evidence pertinent to the state of accounts in the case, so that a trial could be had on the merits. Either party could, and no doubt did, produce the same evidence they would have done had formal and well framed pleas been filed. Under the stipulation, the court was to determine what was proper evidence—what constituted a cause of action or defense—and it was not governed by the pleadings on file. If the pleas to

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which the demurrer was filed presented no defense, then plaintiff could, under the agreement, object to the evidence offered to prove the facts set up, and relied on in them to defeat the action. It changed the decision on the averments in the pleas, from the demurrer, to the admissibility of evidence to prove the defense set up by the pleas. This stipulation waived all question as to the form of the action, the decision of the demurrer, and provides for a trial on the merits.

It is next urged, that the court below erred in excluding the judgment in the case of *George G. McManis v. Miller, Glos-son & Chritzman*, from the jury. It will be observed, that the parties to the two suits are not the same. The suit in that case was on a contract, described as having been entered into in August, 1864, while the suits consolidated and presented by the record now before us, were upon contracts entered into, one in 1863 and the other in 1866. The first plea under which this judgment was offered, duly avers that the suit was brought on the identical covenants sued on in this case, but it fails to state that the recovery was had for damages growing out of the same breaches assigned in this declaration. There is no rule of practice more firmly established, than, to form a bar, the former recovery must be for the identical same cause of action. In this the plea is defective, as it contains no such averment. But if it did, the record, when produced, varies from the averments of the plea, as the breach in that case was on a different contract, bearing a different date, and not that described in the plea. The record was, therefore, properly rejected under this plea.

The second plea, of former recovery, is substantially the same, but more specific in its averments. It does aver that the suit in which it was filed was on the same covenants, and to recover pay for the same cultivators for which this suit is brought. But, on examination, the declaration in the former suit, as we have seen, is on an agreement entered into in 1864, and these suits are on the agreements of 1863 and 1866, and hence there was a clear and fatal variance. But even had the

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record been properly admissible under these pleas, we see from the evidence and from the verdict, the jury could not have considered any claim under the contracts of 1863 and 1864, as the sum found clearly indicates that they only allowed two dollars for each of the six hundred machines manufactured, sold, and the money received, after the contract of 1866 was made.

It is, however, urged, that the evidence fails to establish any contract entered into in 1866. Miller, one of the defendants, swears there was a verbal agreement that they should go on and pay appellee two dollars on each machine they should manufacture, but it was to be reduced to writing, which was never executed. He also says they did not intend to infringe or pirate upon his patent. He says he presumes they manufactured the machines under the verbal agreement. Appellee states substantially the same in regard to the terms of the agreement. But he calls it an agreement, and also an agreement for an agreement. Chritzman says he refused to sign the contract when presented, unless appellee would bind himself to indemnify them against suits for using the patent. He says there was no contract; and appellee says it was not to be binding, unless reduced to writing. Appellants, however, went on and manufactured machines, and unless they had given appellee notice that it was not under the proposition verbally made and accepted, he had a right to consider that it was under the verbal agreement.

If one person makes a proposition to another, and without any formal acceptance the latter proceeds to avail himself of the proposition, that will be a virtual acceptance, and he will be as fully bound as if he had, in terms, accepted the offer. Or if a contract is entered into and the terms agreed upon, and it is understood that it shall be in writing, and the parties perform the agreement, or one of them, without the objection of the other, enters upon the performance of the agreement, the contract, unless of the character required by the statute to be in writing, will be as binding as if reduced

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to writing as agreed. The writing gives no additional force or validity, except in cases arising under the statute of frauds. It is not the agreement, but the evidence of its terms and conditions. The agreement is the meeting of the minds in accord on the various propositions embraced in the contract. From the evidence in the case, we think the jury were warranted in finding the machines were manufactured under an agreement to pay two dollars on each.

It is however urged, that the verdict was excessive in the amount found by the jury. It is contended that, granting there was a binding agreement under which the machines were manufactured, still, under the agreement of 1864, which was renewed by the verbal arrangement of 1866, appellants were limited in the payment to the number of machines sold in the counties of Knox, Henry, Stark and Bureau, which embraced appellee's territory. That agreement provides that appellants and Glosson should pay appellee "the sum of two dollars and fifty cents for each and every cultivator so manufactured and sold by them, and manufactured by them and sold by the party of the first part, within said territory, as his patent fee for the use of said territory; the two dollars and fifty cents to be paid as soon as the parties of the second part shall receive payment for such cultivators so sold, but not before in any case." This language, in terms, limits the payment of royalty to the machines sold in those counties, and then not till the money for which they were sold should be collected. It then follows, that the court below erred in instructing the jury that appellee might recover for the number of machines sold outside of those counties, when they had collected the price for which they were sold; and the verdict was excessive, so far as it embraced the machines sold in other counties.

The evidence tends to show that less than three hundred machines had been sold, after the contract of 1866 was entered into, and the money collected. As the verbal agreement revived the contract of 1864, except they were to pay but two dollars on the machine, even if there had been three hundred

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sold and the price collected, it would have made but six hundred dollars. It seems, from the amount found, that the jury must have allowed for many machines sold outside of appellee's territory, and in this there was error, for which a new trial should have been granted.

If appellee may recover for the manufacture of machines in his territory and sold outside of it, it can not be done on the pleadings in this case. Even if the circuit court could be held to have jurisdiction in such a case, there is no count in the declaration claiming damages on that ground.

The objection that there should have been two separate verdicts rendered by the jury, one under each declaration, is not, we think, well taken. Appellants made no objection when the verdict was returned, in his motion for a new trial, or at any other time in the court below. They must therefore be considered as waiving any irregularity, if it existed. But the cases being consolidated, and the stipulation for a trial on the merits having been entered into, we fail to perceive that any other than the verdict rendered by the jury was required.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

JOSEPH HUMPHREY

v.

WILLIAM N. PHILLIPS *et al.*

1. PLEA IN ABATEMENT—*sending process to a foreign county.* The defendant in an action of assumpsit commenced in the county of Cook, pleaded in abatement that, at the time of the commencement of the suit he was a resident of McDonough county, and had been ever since; that he was not found or served with process in the county of Cook, but that he was served with process in the county of McDonough; that the cause of

57	133
32a	36
57	132
134	388
57	132
38a	424
57	132
141	445
57	132
45a	576
57	132
160	253
57	132
54a	459
57a	676
57	132
69a	218
57	132
174	574
75a	278
57	132
178	552
57	132
97a	1399
57	132
215	1156

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action arose in the county of McDonough, and not in the county of Cook; that the contract upon which the action was brought was not actually made in the county of Cook, and that the same was not, nor any part thereof, made specifically payable in the said county of Cook: *Held*, on demurrer, the plea negatived every material fact necessary to give the court jurisdiction of the person, and was sufficient.

2. *SAME—surplusage.* The clause in the plea which alleged “the cause of action arose in the county of McDonough, and not in the county of Cook,” presented an immaterial issue, under the act of 1861, and might be rejected as surplusage.

3. *SAME—middle initial letter in a name.* The omission in such a plea, of the middle initial letter in the name of the plaintiff, is of no importance, it not being regarded as any part of the name.

4. *SAME—whether certain facts should be negatived.* Where the record shows affirmatively that there was only one defendant, and that the suit was not brought under the attachment laws of the State, it is not necessary to allege those facts in the plea.

5. *SAME—whether an answer to several counts.* A declaration in assumpsit contained three counts; a special count on a sight draft, and two common counts. A plea in abatement, alleging “that the contract upon which the action was brought was not actually made in the county” in which the action was brought, “and that the same was not, nor any part thereof, made specifically payable in” that county, was held sufficient as an answer to the whole declaration. The term *contract*, as used in the plea, could be held to apply to the contract declared on in the several counts, or to each contract in the several counts.

6. *SAME—whether aided by stipulation.* However, a plea can not be aided in that regard, by reference to a stipulation that the contract embraced in the special count, was the sole cause of action relied on. The effect of such stipulation would be simply to limit the proof to that cause of action.

7. *SAME—degree of strictness required.* Such great strictness has never been required in pleas in abatement of this character as in pleas properly to the jurisdiction of the court.

WRIT OF ERROR to the Superior Court of Chicago.

The opinion states the facts.

Messrs. BAILEY & COLE, for the plaintiff in error.

Messrs. GOUDY & CHANDLER, for the defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

The single question presented in this case arises on the demurrer to the plea in abatement.

The suit was commenced in the Superior Court of Chicago, and the summons was directed to the sheriff of McDonough county, and there served upon the defendant.

The declaration is in assumpsit, and contains three counts. The first count is on a draft payable at sight ; the second is a common count, and the third is a count on an account stated. With the declaration was filed a copy of the draft, and the following statement : " Copy of draft sued on, and sole cause of action."

The plea filed alleges that, at the time of the commencement of the suit, the defendant was a resident of McDonough county, and has been ever since ; that he was not found or served with process in the county of Cook, but that he was served with process in the county of McDonough ; that the causes of action arose in the county of McDonough, and not in the county of Cook ; that the contract upon which the action is brought was not actually made in the county of Cook ; and that the same was not, nor any part thereof, made specifically payable in the said county of Cook.

That clause in the plea that alleges that " the cause of action arose in the county of McDonough, and not in the county of Cook," may be rejected as surplusage. It presents an immaterial issue, under the statute of 1861. That act provides that it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except, where there is more than one defendant, then the plaintiff may commence his action in any county where either of them resides, and may have the summons directed to any county where the other defendants, or either of them, may be found. It also provides that the provisions of that act " shall not apply to any case where the plaintiff is a resident of, and the contract upon which the action is brought shall have been

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actually made in, the county in which the action is brought, nor to any proceeding under the attachment laws of this State."

The law has always required great accuracy and precision in the structure and form of pleas in abatement. They must be certain to every intent, and if to the jurisdiction of the court, such pleas must, by averment of facts accurately and logically stated, exclude every intendment in favor of the jurisdiction of a court of general and unlimited jurisdiction. The presumption will always be in favor of the jurisdiction of the court, and the pleader must show that the court has not jurisdiction if he would oust it of its jurisdiction. *Parsons et al. v. Case*, 45 Ill. 296; *Diblee v. Davison*, 25 Ill. 486. As a general rule, pleas in abatement are not favored by the courts. But the right of a party to be sued in the county where he resides, and have his cause tried there, is statutory, and he ought not to be denied that right—a right to him, in many instances, of the utmost importance—by any technical and metaphysical learning in regard to pleas in abatement. The plea, in this instance, is meritorious in its character, in addition to having its foundation in a statutory right. A plaintiff has no moral or legal right to compel a defendant, through mere capriciousness, or merely for the sake of his own convenience, to go to a distant part of the State to make his defense to any supposed cause of action.

The objections to the sufficiency of the plea in this case, are all, with one exception, of the most technical character.

It is objected that the plea omits the middle initial letter "S," in the names of two of the plaintiffs. Such an objection is entirely too trivial to be seriously considered by this court. The middle initial letter has never been regarded as any part of the name.

The only seemingly well founded objection that can be taken, arises upon the last averment in the plea, viz: "That the contract upon which the action was brought was not actually made in the county of Cook, and that the same was not,

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nor any part thereof, made specifically payable in the said county of Cook."

If the declaration in this case contained only the special count on the draft, this averment would manifestly be sufficient to take the case out of the proviso to the section of the act of 1861, above cited. The difficulty is created by the additional counts. The declaration contains the common count and a count on an account stated. It is insisted by the defendants in error that they are counts upon separate contracts, and therefore the declaration counts on more than one contract, and that the plea, while it professes to do so, does not answer the whole declaration. With the declaration the plaintiffs filed a notice that the draft declared on was the "sole cause of action."

It is contended, that although there are three counts in the declaration, this stipulation, in some way, limits the declaration to one contract, and, therefore, that the plea is a sufficient answer. It has been repeatedly held by this court, that such a notice or stipulation forms no part of the declaration. Under our practice, the only office it can perform is to limit the proof to be heard on the trial. The effect would have been to limit the evidence to the draft as the "sole cause of action," and exclude all other causes of action. We do not think the plea can be aided by a reference to that stipulation.

The statute which prohibits the suing of a party out of the county where he resides, except in certain cases, confers a privilege on the citizen, of which he can avail if he chooses. If he does not plead his privilege in apt time, he will be regarded as having submitted to the jurisdiction of the court. It is entirely competent for such party to waive his privilege, and if he does so, the jurisdiction of the court will be complete. In *Kenney v. Greer*, 13 Ill. 432, it was held that a plea alleging such privilege was not a plea to the jurisdiction of the court. The decision proceeds on the ground that the circuit court has a general jurisdiction in all transitory actions, and that the objection is only to the writ as having been sued out and returned in the wrong county.

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Such great strictness has never been required in pleas of this character as in pleas properly to the jurisdiction of the court. Whether the declaration shall be regarded as counting on as many distinct contracts as there are counts in the declaration, or only upon one contract declared on in the different counts, the term *contract*, as used in the plea, may be held to apply to the contract declared on in the several counts, or to each contract in the several counts. The pleader intended to deny that the contract declared on was made in the county of Cook, or was made specifically payable in that county; and if the declaration in fact counts on a contract in each count, it requires no forced construction of the terms used to say that the plea applies to each *contract*, and is, therefore, a complete answer to the whole declaration.

In *Beekman v. Traver*, 20 Wend. 67, the declaration contained two counts, and the taking of one gig charged in each; and the plea alleged that the defendant, as a constable, seized and levied on the "said gig." An objection similar to the one taken here was taken in that case, that the plea did not answer the whole declaration. It was held that the justification was complete and that each trespass was answered.

It is also objected, that the plea does not aver that there were not more than one defendant, and that the suit was not brought under the attachment laws of this State. These facts affirmatively appear to the court by the record, and it is unnecessary to plead them. If the record had disclosed the fact that there were more defendants than one, and that the action was brought under the attachment laws, the plea would be manifestly insufficient.

In our view, the plea in this instance is certain to every intent, and negatives every material fact necessary to give the court jurisdiction of the person of the defendant.

It was, therefore, error in the court to sustain the demurrer to the plea. The demurrer ought to have been overruled and judgment entered for the defendant.

For these reasons the judgment is reversed and the cause remanded.

Judgment reversed.

JACOB FRANK *et al.*

v.

JAMES MORRIS.

1 PRACTICE—*affidavit of merits*. Where a plea of usury in a suit in the Superior Court of Chicago, averred that defendant had paid one hundred and fifty dollars for forbearance in the payment of \$3,850, for seventy-five days, and the affidavit of merits required by a rule of that court stated that the note sued on was given for the balance due on another note and that defendant paid one hundred and twenty-five dollars for forbearance in the payment of such balance for seventy-eight days: *Held*, that the affidavit of merits was insufficient, inasmuch as the defense it disclosed could not be given in evidence under the plea of usury.

2. PLEA—*variance*. Where a plea of usury averred the payment of one hundred and fifty dollars to procure forbearance, and the evidence showed but one hundred and twenty-five dollars thus paid: *Held*, there was such a variance as to exclude the evidence. The defense of usury being penal in its nature the proof must be strict to sustain the defense.

3. NON ASSUMPSIT—*evidence of usury under*. As usury rendered the contract void at the common law, it could be proved under the plea of non assumpsit, like any other defense which showed the contract void, released or discharged. But under our statute the creditor only forfeits the entire interest, and hence the defense does not render the contract void or defeat a recovery of the principal, and the reason for allowing the defense under the plea of non assumpsit does not apply, and the defense of usury must be made by special plea, under our statute.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion states the facts of the case.

Messrs. GOOKINS & ROBERTS, for the appellants.

Messrs. JEWETT, JACKSON & SMALL, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Three questions are presented by the record, in this case.

The question of practice arises upon the rule of the Superior Court of Chicago, referred to and approved by this court in the case of *Wallbaum v. Haskin*, 49 Ill. 313.

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In the Superior Court an action in assumpsit was instituted on this note :

\$4,000.

Chicago, November 8, 1869.

Seventy-five days after date we promise to pay to the order of James Morris, Four Thousand Dollars at Leopold, Mayer & Steine, Chicago, Ills., value received.

[U. S. Rev. Stamp \$2.]

JACOB H. FRANK,
G. GOLDSCHMIDT.

The general issue was filed, and a special plea of usury, alleging, in substance, that the note sued on was for the loan of three thousand eight hundred and fifty dollars, principal, and one hundred and fifty dollars, interest for the forbearance of that sum for seventy-five days.

Issue was joined and the usual affidavit of merits, under said rule, was filed. Thereupon appellants filed an affidavit, detailing the facts, for the purpose of showing that the defense was made in good faith, alleging that appellee held their note for eight thousand dollars; that the note sued on was for the balance due on said first note; and that for forbearance of payment for seventy-eight days, they paid, as interest, to appellee, one hundred and twenty-five dollars. The court ordered the cause to be then tried, as though no affidavit had been filed.

This was not error. Under the pleading the facts were not admissible. The rule required that it should be made to appear to the court, that the defense was made in good faith. A detail of facts which the law will not permit to be proved, does not constitute "good faith," within the meaning of the rule.

The note having been received in evidence, the appellants offered to prove the facts set forth in their affidavit. This was refused, and this refusal is assigned for error.

Was the variance between the plea and the evidence offered, of such a character as to justify the court in the exclusion of the evidence? Did the statement of the time and sum, under a *videlicet*, aid the defective plea? When the matter alleged in a plea is material and traversable, the statement of such

matter under a *videlicet* will not avoid the consequences of a variance. Such matter, if traversed, must be proved. 1 Chitty, 317; Gould's Pleadings, 70. The plea alleged the payment of one hundred and fifty dollars, for the forbearance for seventy-five days; the evidence offered, was the payment of one hundred and twenty-five dollars, for forbearance for seventy-eight days.

Where usury is specially pleaded, the proof must correspond with the pleading; and unless such correspondence exist, the proof must be rejected. Such a defense is in the nature of a penal action, and great strictness is required in pleading it. *Beach v. Fulton Bank*, 3 Wend. 575; *Smith v. Brush*, 8 Johns. 83; *Lawrence v. Knies*, 10 Johns. 140. In the last case the court say: "The rule even requires the contract to be more precisely stated in a plea of usury than in a declaration in a *qui tam* suit, because the facts are within the defendant's knowledge." We think that the variance in the sum is fatal, and that the court properly rejected the evidence under the special plea.

Was the defense of usury admissible under the plea of non assumpsit? At common law such a defense could be made under this plea, for usury made the contract void. Our statutes have never made an usurious contract void. At common law usury is a bar to any recovery; under our law it is only a partial defense. As it is in the nature of a penal action, and he who attempts to avail himself of it should be held to strict proof, (*Hancock v. Hodgson*, 3 Scam. 331; *Law v. Merrills*, 6 Wend. 279,) the rule governing a defense which wholly defeats the action, should not prevail. Usury might be given in evidence under non assumpsit, at common law, for such proof showed that the plaintiff never had cause of action. Lord Chief Baron GILBERT says: "On this issue, (non assumpsit) every thing may be given in evidence which disaffirms the contract, for that goes to the *gist* of the action, since if there be no contract to be performed at the commencement of the action, there could be no trespass for non-performance of it, and

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therefore a release goes to the *gist* of the action, for it shows there was no contract at the time it was commenced. So every thing which shows the contract to be void may be given in evidence under the general issue, for on a void contract the plaintiff has no right of action. Whatever goes to show there was no contract, or that it was performed, or paid, or released, goes to the *gist* of the action, and need not be pleaded." The present case is not embraced by this rule, nor by the reasons of it. In this case, the plaintiff in the court below was only subject to a forfeiture of the whole of the interest, if the usury had been proved. To enforce this forfeiture a special plea is necessary.

It has been urged in argument, that a contrary doctrine is established in *Stockham v. Munson*, 28 Ill. 53. We do not so construe it. There are *dicta* in the opinion looking in that direction. The instrument declared on, in that case, bore thirty-six per cent interest on its face, and the decision is, that a special plea of usury was unnecessary, for the reason that the usury appeared by the contract and in the declaration. It was therefore pleaded by the plaintiff, and it would have been the merest folly to have required the defendant to replead it.

This court has decided, since the act of January 31st, 1857, (the latest enactment upon the subject of interest,) that the defense of usury should be by special plea. The section of the statute of 1857, embracing the forfeiture, is quoted in the opinion. *Hadden v. Innes*, 24 Ill. 384.

We therefore think that the reasons for the common law rule, which permits the usurious contract to be given in evidence under the general issue, do not obtain in this State; and that it is more in consonance with the intent of the statute, that this defense should be specially made.

The judgment of the Superior Court is therefore affirmed.

Judgment affirmed.

JUSTICES McALLISTER SHELDON and WALKER, dissent.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*

THOMAS L. BRECKENRIDGE

v.

WILLIAM S. BROOKS.

1. *WRIT OF MANDAMUS—how to issue.* The clerk of the circuit court has no power to issue a writ of mandamus without an order of the court. The power to award the writ is in the court and not in the clerk, and it is only granted on good cause shown, and such time for the return is fixed by the court as may be reasonable and just.

2. *SAME—certainty.* The writ must be certain, and clearly show on its face, that it is the duty of the defendant to perform the act sought to be enforced. The mandatory clause should, like the body of the writ, expressly state the duty required.

8. Where the petition for the call of an election to subscribe for a specified amount of stock in a railroad company, on several express conditions, and where the alternative writ required the town supervisor to call an election to vote, not as petitioned for, but whether the town would subscribe stock or donate to the railway, without stating amount or conditions, and where the peremptory writ misrecited the petition for the call of the election, but commanded the supervisor "to call an election of the legal voters of the town under the laws of this State:" *Held*, that the peremptory writ was erroneous, as it was too uncertain, in not following the petition for the call of an election.

4. *CONSTITUTION.* Even if the relator was entitled to the writ when it was awarded by the circuit court, still, the new constitution having been since adopted, it could not now be executed, and should not therefore issue.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

The opinion states the case.

Messrs. GOODSPEED, SNAPP & KNOX, for the appellants.

Mr. THOMAS L. BRECKENRIDGE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was an application for a mandamus against the defendant, as supervisor of the town of Joliet, in Will county, to compel him to call an election under and by virtue of "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, 1869, to decide whether the township would subscribe for or donate to the capital stock of the Joliet, Newark & Mendota Railway Company.

The court, in the first instance, granted a rule against appellant to show cause why a *peremptory* writ of mandamus should not issue against him, returnable in ten days, and ordered service of a copy of the order. The day after the expiration of the rule, the time of serving a copy of the order was extended to January 24, 1870, and it seems never to have been served. On the same day there was issued out of the court, by the clerk thereof, an alternative writ of mandamus, returnable on the third day thereafter, January 24, 1870.

This writ would seem to have been issued by the clerk of the court, without any order of the court therefor.

The power to issue writs of mandamus is vested in the courts, not in the clerks of courts. The writ is never granted merely for the asking, but upon good cause shown to the court; and the court is to allow such time to make return as to it shall seem just and reasonable. A clerk can not, in his discretion, make the writ returnable in three days.

We think the writ defective, too, for lack of certainty. The writ must clearly show upon its face that it is the defendant's duty to execute it, and must, with great certainty, call the attention of the defendant to his duty. Tapping on Mand. 322.

The mandatory clause should, like the body of the writ, expressly state the duty required of the defendant, and with great certainty call his attention to it. Id. 326.

In the petition addressed to him, the defendant was desired to call a special election to determine whether the town would

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subscribe for \$100,000 to the capital stock of the railway company, on several express conditions. In the alternative writ, he was required to call an election to vote, not as petitioned for, but whether the town would subscribe to the stock, or donate to the railway, and without reference to any amount or conditions. In the peremptory writ, after misreciting the petition as being whether the township would subscribe for, or donate to, the capital stock of the railway, the defendant was commanded "to call an election of the legal voters of the said township of Joliet, under the laws of this State relating thereto." The defendant would have been perplexed in what manner to call the election. Even if the party had a right to the writ, it could not be executed now, under the provisions of the existing constitution, and therefore should not issue.

The judgment of the circuit court must be reversed.

Judgment reversed.

ASAHEL GAGE *et al.*

v.

CHARLES GRAHAM *et al.*

1. INJUNCTION—*to restrain a tax deed from issuing.* Where a combination is entered into by the collector and the principal bidders at a tax sale, to prevent competition at the sale, and that the lands should be struck off to one of the parties, for the sums charged to the respective tracts, and bidding was thus prevented, the court will enjoin the collector from making a deed to a party to the fraud.

2. CONSTITUTION—*limitation of the taxing power.* The 5th sec. of art. 9 of the constitution of 1848, is a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any but the corporate local authorities, and corporate authorities mean the municipal officers elected by the people to be taxed, or appointed in some mode to which such people have assented.

Syllabus. Opinion of the Court.

3. **SAME—tax levied under unconstitutional law.** Where an act of the general assembly created a corporation and appointed officers called drainage commissioners, and authorized them to survey, locate, complete and alter ditches, embankments, culverts, bridges and roads, and to maintain and keep them in repair, and authorizes such officers to assess the expense and cost of such improvements thereof on lands benefited thereby, and providing that when made in writing, specifying the amount imposed on each tract, and returned to the treasurer of the county, it shall be his warrant for the collection of the same : *Held*, that such an assessment is repugnant to the constitution.

4. The officers making the levy are not elected or appointed with the assent of a municipal corporation, nor with the assent of the persons taxed or assessed. They were appointed by the legislature and organized into a private corporation, and are accountable to no other body or persons. Their power to assess is absolute, and they are not required to assess according to the benefits conferred—the owner is given no hearing on the assessment or appeal for its correction, and the law is unconstitutional. And on a sale under the assessment, a court of equity will grant relief by enjoining the collector from making a deed on such sale.

APPEAL from the Superior Court of Chicago ; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

Mr. EDWARD ROBY, for the appellants.

Mr. JOHN P. WILSON, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a suit in equity, brought by appellees, in the Superior Court of Chicago, against appellants, to enjoin the issuing of tax deeds upon certificates of sale of real estate, for taxes, by the collector of Cook county, for the amount of certain special assessments, levied by the Cook County Drainage Commissioners, a corporation created by an act of the general assembly, adopted in 1852, (Sess. laws, 240). No answer having been filed, the bill was taken as confessed, and evidence

Opinion of the Court.

heard, and the court found the facts charged in the bill to be true. The bill alleges as one of the grounds of relief, that there was a combination entered into before the sale between the principal bidders and the collector, to prevent competition at the sale, and that the property should be struck off to Waterman as the purchaser, for the sums charged against the respective tracts; that, by reason of this combination, bidding on this property was wholly prevented; that Waterman became the purchaser in pursuance of the agreement, and parceled out the certificates among those entering into the arrangement, and endorsed them in blank.

It is charged that Gage and Forsythe thus became and are still the holders of these certificates; that the amount of taxes for which the lands were sold, was a fraud upon the law, upon the owner, and is against public policy; that the collector had issued certificates of purchase in violation of law, fair on their face, thus enabling the holder, by endorsement, to sell them to innocent purchasers, and thus create a cloud on appellees' title, leading to litigation, cost and expense.

By issuing these certificates the same wrong was done as if the officer, without notice, judgment or any public sale, had issued them, inasmuch as no money had been paid, and they were issued without legal authority. Under the authority of the cases referred to in the brief, the court had the power to enjoin the execution of a deed on these certificates, and on the facts charged in the bill and confessed by the default, it was its duty to render the decree.

But there is another objection in this case that is fatal to the tax. It is, that the law under which it is levied is repugnant to the constitution. In the case of *Harward v. The St. Clair & Monroe Levee & Drainage Company*, 51 Ill. 130, it was held, that sec. 5 of art. 9 of the constitution of 1848, was a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any other than the corporate local authorities, and by the phrase "corporate authorities," must be understood those municipal officers who are either

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directly elected by the people to be taxed, or appointed in some mode to which they had given their assent. And the same construction was adopted and applied in *The People v. The Mayor, &c. of Chicago*, 51 Ill. 17; and again, in *The People v. Canty*, 55 Ill. 33.

The first section of the law under which this tax was levied, creates persons therein named a body corporate. The second section authorizes the corporation to survey, locate, complete and alter ditches, embankments, culverts, bridges and roads, and to maintain and keep them in repair, on the lands in certain townships, in one of which the lands in controversy are situated. The fifth section provides, that the expenses of constructing such improvements together with the costs incurred on account thereof, shall be assessed upon the lands benefited thereby, and authorizes the commissioners named in the act, or any three of them appointed at a regular meeting, to make an assessment in writing, describing the lands assessed, and setting forth the amount imposed upon each tract separately, which, when certified by the commissioners making the same, shall be delivered over to the county treasurer of Cook county, who is authorized and required to collect the same, and the assessment thus made and certified is made his warrant for collecting the assessment.

It will be perceived that these officers are not elected, or appointed with the assent of a municipal corporation, nor with the assent of the persons to be taxed or assessed. They are appointed by the legislature and organized into a private corporation. They are clothed with large, if not dangerous, powers, are accountable to no person for their acts, and their doings are not subject to revision by any other body. Their power to make the assessment is absolute, and is limited by no rule but their discretion. They are not even required to make the assessment according to the benefits the improvements will confer. They may assess any amount, even to the value of the land, so it is on lands benefited, and the owner is given no hearing on the assessment, or an appeal to correct it. If such private corporations may be organized with such absolute

Syllabus.

power over the property of others, and they can be sustained, then the guarantees for our property are slender and precarious to an extent that but few had supposed. The very object of all government is security to life, liberty and property. If such burdens may be imposed without any rule but the pleasure or whim of three men, and these enforced under our laws, the tenure by which the citizen holds his property is slender indeed.

This law is violative of the 5th sec. of art. 9 of the constitution, and hence the assessment can not be sustained. The case is like that of *Harward v. The St. Clair & Monroe Levee & Drainage Company*, *supra*, in its material features and it must be governed by it.

No error is perceived in this record, and the decree of the court below must be affirmed.

Decree affirmed.

JESSE SPAULDING *et al.*

v.

JAMES I. MOZIER *et al.*

1. **EQUITY—correction of mistake.** Where personal property is correctly described in a chattel mortgage, but the lot of ground upon which it is situated is misdescribed, such misdescription will be rejected as surplussage, and equity will not take jurisdiction to make a useless correction of the mortgage.

2. **EVIDENCE—parol.** In such a case parol evidence would be admissible to establish the identity of the property, and in this the law affords a full and complete remedy, and it must be sought on the common law side of the court.

3. **SALE—mortgaged chattels on execution.** Where creditors hold an execution against the mortgagor of chattels, they may sell such chattels subject to the lien of the prior mortgage, and equity will not enjoin such a sale.

APPEAL from the Circuit Court of Lake county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Statement of the case. Opinion of the Court.

This was a bill in chancery filed by Jesse Spaulding and Henry H. Porter, in the Lake circuit court, against James I. Mozier, Joseph F. Hubbel and George H. Bartlett, to correct a mistake in a chattel mortgage, and to enjoin the sale of the property under an execution. The chattel mortgage was executed by Hubbel to Spaulding and Porter on the 16th day of August, 1869, to secure the payment of \$619.06, evidenced by two promissory notes, one for \$309.53 due in four months from date and the other for the balance of that sum due in six months, both bearing ten per cent interest. The mortgage was duly recorded.

The property was described in the mortgage, as "a certain one and a half story frame building situate on lot number one (1), block number eighteen (18), in the village of Highland Park, county of Lake, and State of Illinois, together with a mortising machine and all other machinery and fixtures therein contained." The bill alleges that the house and property were in fact situated on lot eleven in block eighteen in the said village.

On the 2d day of January, 1870, Mozier recovered a judgment for \$859.35 and costs, in the Lake circuit court, and on the 8th day of that month a *fiery facias* was issued thereon, directed to Bartlett, sheriff of that county, who levied it on the property described in the mortgage, and intended to sell the same. The circuit court, on the hearing, dismissed the bill for want of equity, at the cost of complainants.

Messrs. SMITH, UPTON & WILLIAMS, for the appellants.

Mr. O. B. SANBURN, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was filed in the circuit court of Lake county, to correct an alleged mistake in a chattel mortgage, and to enjoin the sale of the mortgaged property under an execution in favor of the appellees.

Opinion of the Court.

The property mortgaged is correctly described, but the mistake which is sought to be corrected consists in a misdescription of the lot of ground upon which the property was temporarily situated.

The mistake complained of is wholly immaterial, and the aid of a court of equity can not be invoked to do a useless thing.

That part of the mortgage that designates the property as being then situated "on lot one, block number eighteen, in the village of Highland Park," may be rejected as surplusage, and without it the description of the property conveyed is perfect. The geographical position of the property, at the date of the execution of the mortgage, forms no necessary part of the description of the property itself.

In case a controversy should arise as to the identity of the property, parol evidence would be admissible to identify the property covered by the mortgage.

In *Myers v. Ladd*, 26 Ill. 415, parol evidence was held to be competent for such a purpose, and that when the property was so identified consistently with the description in the mortgage, it was sufficient.

After rejecting those words which locate the temporary position of the property at the date of the execution of the mortgage, enough remains to convey the property, and there is therefore nothing for a court of equity to correct, even if it possesses the power to reform such instruments. The law affords the appellants a full and adequate remedy, and whatever rights they may have under the mortgage, they must pursue on the common law side of the court.

It was lawful for the appellees, who were judgment creditors of the mortgagor, to sell the property subject to the mortgage, and there was therefore no reason for the interference of a court of equity on that ground. The bill was properly dismissed.

The decree of the circuit court is affirmed.

Decree affirmed.

MARK SKINNER *et al.*

v.

THE LAKE VIEW AVENUE COMPANY.

87	151
120	252

1. **APPEAL**—*when it will lie.* Where a corporation is formed, under the general law of 1859, for the purpose of constructing plank, gravel or macadamised roads, and authorized to condemn lands therefor, by presenting a petition to a judge of a court of record for the appointment of commissioners for the purpose, and where commissioners have been thus appointed and returned their report into court, and it has been approved by the court, the order of approval becomes a final judgment, from which an appeal lies to this court, notwithstanding the act providing for the condemnation is silent as to an appeal or writ of error.

2. A judgment before a justice of the peace is final unless the law gives an appeal. The circuit courts have no inherent power to try appeals from inferior tribunals, and can only entertain them by virtue of statutory power.

3. In cases in which the statute declares the action of an inferior tribunal to be final, and prohibits an appeal or writ of error, such action must be held conclusive, unless it violates a constitutional right. But parties have the right of appeal from the circuit to the supreme court, where the judgment or decree is final and relates to a franchise or freehold.

4. **JUDGMENT**—*final.* Where, under the statute, the petition was presented to the court, commissioners were appointed, made their report, the clerk recorded the orders, and the court confirmed the report: *Held* this constituted a condemnation of the land by which the title passed to the corporation. Such a judgment relates to a freehold and is within the constitution and statute which authorizes an appeal.

5. **JURISDICTION.** In such a case the presentation of the petition confers jurisdiction.

6. **PETITION.** Where the statute declares "the directors may present a petition," it is fully complied with when the petition is signed by the corporation by its attorney. In suits by corporations, the corporate name and not the name of the directors, is used.

7. **NOTICE**—*appearance.* The filing of the petition and the appearance of the parties dispensed with notice required to be given of the time and place of hearing. The presenting of the petition, properly describing the land, praying for the appointment of appraisers to assess damages, gave jurisdiction of the subject matter, and appearance, of that of the persons. After the parties appear notice is wholly unnecessary.

Syllabus. Opinion of the Court.

8. **ELECTION OF DIRECTORS—evidence of.** A certificate signed by persons, in compliance with the statute, with the proper certificate of the county clerk appended as required by law, is evidence of the election of directors.

9. **COMMISSIONERS—their proceedings—notice.** Where the statute requires the commissioners in condemning land, to view it and hear evidence as to damages, it is held to be indispensable to their action that they give personal notice of the time and place of meeting to assess the damages, and a recital in their report that they had given notice is insufficient; it should appear in the report or the order approving the same.

10. The record should show service of notice of the time of filing the report. Under the 13th section of the act, the court has the power to modify the assessment made by the appraisers, and for such purpose evidence may be heard, and the owner of the land should have notice, that he may be heard on the question.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The facts are stated in the opinion.

Messrs. MATTOCKS & MASON, and Mr. EDWARD S. ISHAM, for the appellants.

Messrs. GOUDY & CHANDLER, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The Lake View Avenue Company was organized as a corporation, under the general law of 1859, for constructing plank, gravel or macadamized roads or pikes. The corporation presented a petition to the judges of the Superior Court of Chicago, for the condemnation of the land of one Newberry, deceased, by whose will appellants hold the land, as trustees.

The court appointed appraisers, who made a report condemning the land prayed for, and allowed no compensation. This report was approved by the court, and from this order of confirmation appellants prosecute this appeal.

It is contended on the part of appellee, that the action of the superior court, or the judges thereof, is final, and that no appeal will lie.

Opinion of the Court.

The statute under which this corporation was formed, does not provide for an appeal, or the prosecution of a writ of error. Neither does it declare that the action of the court below or the judge to whom the petition may be presented, shall be final

The cases of *Ward v. The People*, 13 Ill. 637, and *Moore v. Mayfield*, 47 Ill. 167, cited by appellee, have no proper application to the position assumed. In the first case, it was sought to recover a penalty, for the violation of a statute which conferred jurisdiction upon a justice of the peace, without any provision for an appeal. The justice's court is an inferior tribunal, with a special and limited jurisdiction, and its decision is final where the statute makes no provision for an appeal. This court held, that the circuit court had no inherent power to entertain appeals from inferior tribunals, and that the general provision of the statute, for appeals from the judgments of justices of the peace, did not apply to judgments for penalties which are criminal in their character.

In the case of *Moore v. Mayfield*, *supra*, the statute, which was construed, expressly provided that the decision of the circuit court should be final. Without overriding the statute entirely no appeal could be sustained in such case.

Parties have the right to appeal from the circuit to the supreme court, in all cases where the judgment or decree shall be final, and shall relate to a franchise or freehold.

The act under which this proceeding was had, directs the presentation of the petition to the judge of any court of record; that the judge shall appoint a day for the hearing of the parties, and order a notice to be given of the time and place of hearing, the appointment of appraisers, the confirmation of their report, and, when necessary, the modification of the assessment made by them.

These provisions clearly intend an application to a court. For the effectual operation of the law, the machinery of the court must be put in motion. The clerk must record the orders, and the sheriff give the notices required.

The petition was therefore properly presented to the judges of the superior court. The approval of the report of the appraisers was a final judgment. The proceedings were entered of record, and constituted a condemnation of real estate, by which the title of appellants was divested, and, by virtue of the statute and the judgment, transferred to the corporation. The judgment relates to a freehold, and is within the provisions of the constitution and the statute which authorize an appeal. *Morris et al. v. The City of Chicago*, 11 Ill. 650.

Numerous objections are urged to the regularity of the proceedings.

It is contended that the court had no jurisdiction of the subject matter. The presentation of the petition conferred such jurisdiction. The statute, which says, "the directors may present a petition," is fully complied with when the petition is signed by the corporation by its attorney. In all suits and proceedings the corporate name must be used, and not the names of the directors.

The filing of the petition and the appearance of the parties in interest dispensed with the notice required to be given, of the time and place of hearing. Consent, then, gave jurisdiction of the persons, but not of the subject matter of litigation. Jurisdiction of the latter was obtained by a compliance with sec. 9 of the act of 1859, by presenting the petition, properly describing the lands, and praying for the appointment of appraisers to assess the damages. The service of notice was wholly unnecessary, after the appearance of the parties.

It is objected that there is no evidence in the record of the due election of directors. There is in the record a certificate, signed by five persons, in full compliance with section 1 of the act before referred to, and appended thereto a certificate of the county clerk, according to section 17 of the same act. The certificate of organization is in strict accordance with the statute.

But there is a fatal objection to the action of the appraisers, and the subsequent action of the court.

Syllabus.

Section 12 of the act provides that the appraisers shall view the lands and hear evidence as to the damages sustained. It is an indispensable prerequisite to any action on their part, that they should give personal notice of the time and place of meeting to ascertain and assess the damages which any owner may sustain. The recital by the appraisers in their report, that they had given notice, is not sufficient. The notice should appear in the report, or in the order of the court approving the same.

There is no evidence in the record that appellants had any notice of the time of filing the report. According to section 13 of the act, the judge of the court may modify the assessment made by the appraisers, as to him shall seem just. For such purpose evidence might be heard, and appellants should have had due notice of the filing of the report.

For such irregularities, the judgment is reversed and the cause remanded.

Judgment reversed.

COLUMBUS, CHICAGO & INDIANA CENTRAL RAILWAY
COMPANY

v.

NICHOLAS TROESCH.

NEW TRIAL—*verdict against the evidence.* In this case, the verdict of the jury being manifestly against the weight of the evidence, the judgment is for that reason reversed.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

57	155
93a	87

57	155
110a	106

Mr. E. WALKER, for the appellant.

Messrs. HERVEY, ANTHONY & GALT, and Messrs. MERRIAM & ALEXANDER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The declaration in this case alleged that, on the 20th day of September, 1868, the plaintiff, as conductor, had charge of a train of cars on the road of the defendant, in the city of Chicago; that the defendant was at the time negligent of its duty in the use upon said train of an insufficient and unmanageable locomotive engine, unfit for use on said road, of which unfitness the defendant had notice, and of which the plaintiff was unaware, and that there was further negligence upon the part of the defendant, in the employment upon such train of a reckless and incompetent engineer, and that by reason of such negligence the plaintiff sustained great personal damage and injury.

The defendant pleaded the general issue. The case was tried before a jury, and a verdict rendered in favor of the plaintiff; a motion for a new trial was overruled and judgment rendered upon the verdict, and the cause was brought to this court by appeal.

The facts and circumstances which gave rise to the alleged cause of action are briefly as follows:

In the fall of 1867, the plaintiff entered the service of the defendant, as switchman, in the yards at Chicago. His particular duties under his employment were, to assist in the making up of trains, coupling and distributing cars. He was under the immediate control and subject to the orders of the yardmaster. He continued this service a few months, when he received an injury which disabled him from labor for about four months, but returned to work in the same capacity in June, 1868, and continued until September 21, 1868.

A few days previous to the last named day, the plaintiff was promoted to switch conductor, and as such had control of

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different trains in the yard, subject, however, to the orders of the yard-master. On the morning of September 21, 1868, the plaintiff took charge of a train, composed of flat cars, some eight or ten in number, loaded with railroad iron rails, under orders to proceed to Hoyne street, take on two more cars, and distribute or leave the cars elsewhere. Attached to this train was engine No. 34 (known as a switch engine,) under the control of Ransom Tupper as engineer, with James Casey as fireman; the plaintiff had, as an assistant or helper, Edward Bennett. The cars were all in front of, and being pushed by, the engine; the plaintiff standing upon the front end of the forward car, while Bennett was upon the engine with Tupper and Casey; there being no other persons upon the train. At Hoyne street it was necessary to bring the train to a full stop for the purpose of opening a switch, a fact known to both the plaintiff and Tupper. When at a distance of several car-lengths from Hoyne street, the plaintiff gave the engineer a signal, relative to the character of which there is contradictory evidence, but designed, at all events, to further reduce the rate of speed at which the train was moving, and in response to which Tupper reversed his engine. The effect of this reversal was to reduce, suddenly, the speed of the engine, and then to take up the slack or link with which the first car was attached to the engine, and thence from car to car until the last or forward car was reached, upon which the plaintiff was standing; also to produce a *jerking* of the cars, caused by the sudden reduction of speed. This threw the plaintiff off from and in front of the car, two or more cars passing over him, causing the injury complained of. Thus far in the statement of the circumstances of the case, the evidence of both parties concurs.

The question presented on this record is one of fact,—whether the verdict is sustained by the evidence.

As to the condition of the engine,—it appears in the fore part of 1868, to have been materially defective, and much out of repair; but about the 1st of June, it went into the machine shop for repairs, and remained there until about the middle of

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August, and underwent what is called a "general overhauling," and came out thoroughly repaired and in good condition, and remained so until the time of the accident. There was some evidence going to show that it was not in a good condition after being repaired, but we think the very decided preponderance of the testimony was to the contrary.

The testimony as to the bad character of Tupper, as engineer, was confined essentially to that of three witnesses, Crowther, Gamble and Wilson; and was to the effect that Tupper was habitually passionate and reckless, and in the habit of refusing to obey signals given him for the purpose of regulating the running of his engine. It is a circumstance calculated to diminish the force of this testimony, that if the witnesses really deemed Tupper an unsafe engineer, they should have continued for so long a time to remain associated in service with him without complaint, as Gamble and Wilson did, as switchmen, with their lives and persons exposed to peril; and that Crowther, the yard-master, who had control of the switchman and engines engaged in and about the yard, should have kept, for nearly one year, Tupper and engine 34 at work in and about the yards, and without warning to the plaintiff or other employees. Crowther does testify, that he made complaint of Tupper to Burdell, the master mechanic, but Burdell positively denies it, or that he knew or heard anything as to the incompetency of Tupper.

Opposed to this, is the evidence of John Bennett, a witness called for the plaintiff, who had worked as switchman with Tupper; the defendant's witnesses, Milo Jacks, yard-master at the time, and who had known Tupper as engineer and fireman for five or six years; D. T. Harkness, division superintendent of the defendant's road at the time of the injury, with his office at Chicago; Amos Burdell, master mechanic of the defendant at Chicago, who promoted Tupper to the charge of the engine—but did not do so until he saw him for weeks in his immediate presence, and had an opportunity to become personally acquainted with his fitness for the place; George Merrian, his

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assistant, and John Casey fireman upon engine 34, under Tupper.

It may be said, that Tupper was under the eye of these men for most of the time, and each of them testifies, that he never heard that Tupper was reckless or incompetent, and never saw anything that would indicate such imperfections of character.

Evidence was given as to three former accidents upon Tupper's train; but as to the one to the witness Wilson, he entirely exonerates the engineer. The accidents to Drake and Lowry were reported to Mr. Harkness, as superintendent, who examined the circumstances, and became satisfied that it was "their own fault"—that of Drake and Lowry.

We think there is a clear failure in the evidence, to show that the company did not exercise reasonable care, judgment and vigilance, in the selection and continuance in employment of this engineer.

It is to be remarked, that the essential complaint against the engineer is, that he was in the habit of getting into a passion, and of doing rash and reckless things when in that state; but in the present case, there had been no occurrence to provoke passion, and nothing appears to have been done under its influence.

What is complained of in this case as the wrongful act of the engineer, is, that in consequence of a certain signal given by the plaintiff, he reversed his engine, instead of "shutting off" steam.

Two signals are spoken of in the testimony, one, the raising both arms, indicating a reduction of speed, when steam should be "shut off;" the other, the raising of one arm, a request to "stop," to be effected by reversing the engine.

Both the plaintiff and Edward Bennett, his assistant, testified, that the signal was given with both arms, but Bishop, another witness for the plaintiff, who was a trackman in the employ of the North Western Railway company, at work repairing the track near the switch, and had stepped from the track and stood watching the approach of the train, testified that the signal was

given with one arm—with his statement Tupper, and Casey, the fireman, concur; both are positive that the signal was given with one arm.

The train in this case was controlled entirely by the engine; no breaks were used, it not being customary to use them on similar trains. In approaching a stopping place, according to the testimony, the engineer must so reduce his speed as to be able to stop without violence to his train or engine, and this, either with or without signals from the conductor. Tupper testified, that he knew he must stop his train before reaching Hoyne street, for the purpose of opening the switch; and on that account, as a proper means of reducing his speed, "shut off" his steam some ten or twelve car lengths from the switch. Casey testifies to his so shutting off steam, and no witness testified to the contrary; and they both testify, that afterwards, when about two car lengths from the switch, the signal was given. Now if the steam had been "shut off" when the signal was given, it was the duty of the engineer to "reverse," whether the signal was to "slow" or "stop." The evidence is uncontradicted, that with the steam shut off, on receiving a signal to "slow," it would be the duty of the engineer to "reverse," as he could in no other way reduce the speed of his train.

The evidence is quite weak, as showing even any act of negligence, on the part of the engineer. The appellee himself seems to have been negligent in occupying the position he did, at the time he was thrown from the train. He was standing near the end of the platform car, upon the rails with which it was loaded, liable, upon a sudden reduction of speed, to be precipitated off the car; which seems to have been a place of unnecessary peril. The proper place for a conductor to occupy, as testified to, is back far enough from the end of the car, to prevent any accident of being thrown off the car, from the jerking of the train.

Regarding the verdict in this case as being manifestly against the weight of the evidence, the judgment is reversed and the cause remanded.

Judgment reversed.

JOHN G. SHORTALL

v.

ALEXANDER MITCHELL *et al.*

1. **SPECIFIC PERFORMANCE**—*laches on the part of the purchaser—whether excusable.* In a suit for the specific performance of a contract for the sale of land, on which no money had been paid, brought by the purchaser against the vendor, it was *held*, the purchaser could not be excused for the failure on his part to pay the purchase money when due, on the ground there was an apparent lien on the premises, for a sum of money in favor of a third person, having, before he claimed to have any knowledge of the existence of such lien, and after the purchase money was due, lost the right to ask a court of chancery for a decree of specific performance, by showing himself either unable or unwilling to perform his part of the contract.

2. Though, had the vendor brought suit against the purchaser, the apparent lien, upon the record, might be of some importance.

WRIT OF ERROR to the Superior Court of Chicago ; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

Mr. JOHN BORDEN, for the plaintiff in error.

Messrs. HITCHCOCK, DUPEE & EVERTS, for the defendants in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

This was a bill for specific performance, brought by Shortall, against Alexander and James Mitchell, upon the following memorandum :

“ Chicago, Ill., Dec. 4th, 1867. I have this day sold to John G. Shortall, my lot on south-west corner of Prairie avenue

11—57TH ILL.

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and Sixteenth street, (about 92 feet x 177 feet,) for \$20,000, payable as follows :

\$2,000 cash, receipt acknowledged ;

\$8,000, on or before 5th January, 1868 ;

\$5,000, on or before 1st January, 1869 ;

\$5,000, on or before 1st January, 1870 ; the last two payments to bear interest at the rate of eight (8) per cent per annum, from 1st July, 1868, payable semi-annually.

Witness my hand and seal.

ALEX. MITCHELL, (SEAL.)
Per JAMES MITCHELL.

Possession to be given of said premises, on or before 1st April, 1868.

“ J. G. SHORTALL. ”

On the hearing, the court dismissed the bill. We are of opinion there was no error in this decree. We can briefly state the grounds of our opinion, without recapitulating all the facts or going over all the correspondence contained in the record.

It should be first remarked, that no part of the two thousand dollars mentioned in the memorandum as a cash payment, was in fact paid. This item was specified merely for the purpose of making the nominal price of the property twenty thousand dollars, while it was, in fact, but eighteen thousand. The appellant therefore, can not complain of hardship, or appeal to the conscience of the court, on the ground that he has parted with his money. He has paid none, and must rest solely on his contract.

By that contract, he was to make his first payment on or before the 5th of January, 1868. The time was extended until the 16th of January, 1868, when he was to be ready to pay in full. Alexander Mitchell, who lived in Montreal, and who held the legal title to the property, as security for a large sum of money, had come to Chicago, and was waiting to have the matter closed. Instead, however, of meeting this engagement, the complainant left Chicago for New York, on the 11th of

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January, and did not return until the 18th or 19th of the same month, at which time, both Alexander and James Mitchell, had left Chicago, the former for Montreal, the latter for Scotland. They were still willing, however, to close the sale, and for that purpose had left with their brother, George Mitchell, the requisite deeds. He saw complainant soon after his return, and informed him he had the deeds ready for delivery, but the latter was not prepared to pay. On the 23d of January, complainant wrote to James Mitchell, expressing his disappointment in not having been able to pay, saying that money was scarce, and he could not negotiate his paper without making more of a sacrifice than he was willing to submit to, and making a new proposition to pay part down, and the residue in two, three and four years. On the 28th of January, he had another interview with George Mitchell, claiming to be ready to pay, but for a lien which he had discovered on the property, in the form of a decree for alimony, at \$500 per annum, payable to the wife of James Mitchell. He gave this as a reason for not paying. On the 31st of January, Alexander wrote to George Mitchell, to let the matter drop if Shortall had not paid. James Mitchell returned to Chicago in April, and the complainant then made a formal tender of the money, and demanded a deed, which was refused.

From this statement of the main facts, it is apparent Shortall is not entitled to a decree for specific performance. The object of the defendants in making the sale, was to raise immediately a considerable sum of money. For that purpose, the first payment, which was to have been made on the 5th, was extended by agreement, to the 16th, and the entire purchase money was then to be paid. But Shortall not only did not pay at that time, but admitted to George Mitchell his inability to do so, and on the 24th, wrote to Alexander the letter above described, in which he virtually repudiated the contract. In view of these facts, we are at a loss to understand on what ground he can claim the court should compel these defendants to make him a deed. He has paid them nothing.

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He has disappointed them by failing to pay when he promised, although they were anxious to complete the contract. Even if he was ready to pay on the 28th, but for the decree for alimony, it was then too late to make that offer the basis of relief, for he had already virtually repudiated the contract, not on the ground of the decree, but because he could not make the payment. The alimony had, however, been satisfied in another manner, and in view of the entire correspondence, we are inclined to the opinion that Shortall was aware of that fact, and that the talk about the alimony on the 28th, was for the purpose of gaining further time. But whether so or not is immaterial, as he had already admitted his inability to pay, and had proposed a new contract. If the defendants had brought suit against him, the apparent lien upon the record might be of some importance. When, however, he is seeking the aid of the court, he can not excuse his non-payment on the 16th, or his letter of the 24th, by alleging that on the 28th he, for the first time, discovered there was an apparent lien, though there was none in fact. Before he claims to have had any knowledge of this apparent lien, he had lost the right to ask a court of chancery for a decree of specific performance, by showing himself either unable or unwilling to perform his part of the contract.

Decree affirmed.

FREDERICK SULZER

v.

LYDIA YOTT.

1. NEW TRIAL—*newly discovered cumulative evidence.* A new trial will seldom be granted to let in newly discovered cumulative evidence, and then only when it seems to be decisive in its nature.

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2. **SAME—excessive damages.** In an action for a breach of promise of marriage, where the evidence showed the defendant to be worth \$7,000, it was regarded that while a verdict for the plaintiff of \$1,500 might be considered full if not large compensation, yet it was not beyond the discretionary power of the jury. In actions of that character, which sound in damages, the jury necessarily have a wide latitude in fixing the amount.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Messrs. HERVEY, ANTHONY & GALT, and Mr. W. B. SNOW-HOOK, for the appellants.

Messrs. C. & C. P. KINNEY, Mr. THOMAS DENT and Mr. M. A. RORKE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee in the circuit court of Cook county, against appellant, on a breach of promise to marry. The declaration was in the usual form, to which was filed the plea of the general issue, and a special plea, averring that appellee excused appellant from performing his agreement to marry her. Issue was taken on these pleas, and a trial was had, resulting in a verdict in favor of appellee for \$2,039.58, of which amount appellee remitted \$539.58, under the direction of the court, whereupon judgment was rendered against appellant for \$1,500 and costs, from which this appeal is prosecuted.

A reversal is urged, principally on the ground that the evidence fails to sustain the verdict. The record discloses the fact, that appellee testified positively to the marriage engagement, while appellant, on the other hand, as positively denies that it existed, and he is fully as positive in the denial as she

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is in the assertion. But appellee is corroborated by Mrs. Campbell, who testifies that appellant, in a conversation with her in reference to the matter, stated he had never been engaged to any other person than appellee. Again, he seems to have paid attention to her, and the jury had all the evidence and circumstances before them, and had every opportunity of judging from the appearance, manner and intelligence of the witnesses, to whom credit should be given. Appellee, being corroborated strongly by a disinterested witness, who stands unimpeached, inclines the weight of evidence in her favor, and to our mind, the evidence was amply sufficient to warrant the jury in finding that there was a promise to marry, and its breach.

An effort was made by appellant to prove, by his father, that appellee admitted, in substance, that she had released appellant from the engagement. In this there was an entire failure, as the father is contradicted by appellee and her sister-in-law, who were present at the conversation to which he refers. Their contradiction is clear, distinct and positive, and we would be at a loss to see how the jury could fail to give them credit. We are unable, in view of all this evidence, to say that there is not a clear preponderance of the evidence in favor of the finding. Without seeing the witnesses on the stand, we can see nothing in the evidence to dissatisfy us with the verdict.

Again, the circuit judge who tried the case, overruled the motion for a new trial, thus expressing his satisfaction with the action of the jury. With his superior advantages for determining the proper weight to be given to evidence, his decision is entitled to weight when it is being reviewed in this court. Under the responsibility of his duties, we can not suppose the circuit judge only regards a motion for a new trial as merely formal, but that he acts conscientiously, and determines such motions as he does all other questions upon which he passes.

The motion for a new trial, based on the affidavits of newly discovered evidence, was properly denied. When examined in

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connection with the testimony in the record, it is apparent that such evidence, if produced, would only be cumulative. It discloses no independent proof, but is only corroborative of that heard by the jury, and is not decisive in its character. The court seldom grants a new trial to let in newly discovered cumulative evidence, and then only when it seems to be decisive in its nature. *Bruce v. Truett*, 4 Scam. 454; *Morrison v. Stewart*, 24 Ill. 24; *Martin v. Ehrenfels*, 24 Ill. 187; *Wilson v. The People*, 26 Ill. 434. These cases are decisive of this question, inasmuch as the evidence proposed to be produced is not of the character required. If new trials were allowed for the purpose of letting in newly discovered evidence, of the character proposed in this case, justice might, and no doubt would, be delayed almost indefinitely in all litigated cases.

If the newly discovered evidence had been introduced, we do not see that it would likely have affected the result of the trial. It was natural for appellee, after appellant had refused to keep his engagement, when annoyed by an allusion to it, to say that she did not want to marry him; that she would sue him and make him pay for the breach of promise, and that she preferred the money to marrying him. We infer from the evidence, that appellant's mother had made slanderous charges against appellee; appellant had refused to keep his engagement, and she would have been something higher than human had she not felt indignant, and would have been unusually prudent, had she failed on some occasion and to some person, to manifest feeling and even bitterness. Had the declaration proposed to be proved, been made to appellant, on a tender to marry on his part, then this evidence would have been important, as showing a refusal on her part to comply with the engagement. But there is no pretense of such an offer on his part, and none of the circumstances are given under which she made the statement imputed to her. We are clearly of the opinion that

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the court acted correctly in refusing to grant the new trial on these affidavits.

In actions of this character, which sound in damages, the jury necessarily have a wide latitude in fixing the amount, and we are not prepared to say the judgment in this case is excessive. Appellant is shown to have been worth \$7,000, and the verdict, as amended by the remittitur, was but \$1,500. It may be that the compensation is full, if not large, but is not, we think, beyond the discretionary power of the jury.

A careful examination of the record in this case, fails to disclose any error for which the judgment of the court below should be reversed, and it is affirmed.

Judgment affirmed.

BARQUE "GREAT WEST No. 2"

v.

LOUIS OBERNDORF *et al.*

1. ATTACHMENT OF BOATS AND VESSELS, *under act of 1857—when the lien accrues.* Under the act of February 16th, 1857, relative to the liability of vessels for debts contracted on account thereof, there exists a lien on such vessels in favor of the material-men for the supplies furnished, from the moment the liability therefor is incurred. Such lien is acquired by force of the statute, and not by virtue of the levy and seizure under the attachment warrant, which is the remedy provided for the enforcement of the lien, and does not create the lien.

2. SAME—*of the priorities of liens, and time of enforcing them.* The act of 1857 must be construed in connection with the act of 1845, to which it is an amendment, and which expressly provides, that such debts shall have the preference of all other debts due from the owners or proprietors of boats and vessels of all descriptions * * * running upon any of the navigable waters within the jurisdiction of this State, excepting the wages of mariners, etc., which are to be first paid; and in connection with the act of 1855, which extends the time for enforcing such liens as against other creditors, or subsequent incumbrancers, and bona fide purchasers, from three to nine months.

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3. But such liens can not take priority over previous incumbrances, such as judgments and mortgages, but can only prevail as against debts and demands for which there exists no prior lien.

4. FORMER DECISIONS. The cases of *Williamson v. Hogan*, 46 Ill. 504, and *The Tug Montauk v. Walker & Co.*, 47 Ill. 835, so far as they hold that, under the act of 1857, no lien is expressly created against vessels by the contract for furnishing supplies, and in furnishing them, are overruled.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion states the case.

Messrs. RAE & MITCHELL, and Messrs. KING, SCOTT & PAYSON, for the appellant.

Messrs. MILLER, VANARMAN & LEWIS, and Messrs. HOYNE, HORTON & HOYNE, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the Superior Court of Chicago. The cause was before that court at the April term, 1870, on the following agreed facts:

It is stipulated in the above entitled causes, that the Barque Great West No. 2, was at the time the causes of action respectively arose, owned by Edward McDonald, and William H. McDonald, who resided in the City of Chicago; that the vessel was at the time a vessel running upon the navigable waters of the State of Illinois, and engaged in commerce between the port of Chicago and ports in other States on the lakes, and that the labor, materials and supplies mentioned in said accounts were furnished by order of the owner or master of the barque, and that the prices are just and correct, and that said supplies were furnished said vessel while in Chicago river, and were consumed on said vessel while she was engaged in commerce between the port of Chicago, and ports in other States on the lakes; that the account of Oberndorf &

Co. commenced on the 16th day of March, 1868, and ended on the 26th day of July, 1869, and amounts to the sum of \$298.68; that the account of Doolittle & Bates commenced on the 14th day of July, 1868, and ended on the 10th day of April, 1869, and amounted to the sum of \$109.38; that the account of Purrington & Scranton commenced on the sixth day of March, 1868, and ended on the 28th day of July, 1869, and amounted to the sum of \$787.97; that the account of Gottleib Schlect commenced on the 4th day of April, 1868, and ended on the 9th day of November, 1868, and amounts to the sum of \$218.71.

It is further stipulated, that before and at the time of furnishing said labor, materials and supplies, said barque was mortgaged for the sum of \$14,000, to James E. King, and Edwin L. Jillett, which mortgage was recorded on the 5th day of March, A. D., 1868, at the collector's office in the port of Chicago, and not elsewhere, the place where the vessel belonged and was enrolled and licensed, a copy of which mortgage is hereto attached. That on the 27th day of July, 1869, the mortgagors having made default in the payment and failed to perform the conditions and covenants in said mortgage on their part, the mortgagees took possession of said vessel, and after advertising her for sale for the time required by said mortgage, to wit: thirty days, sold the said vessel in pursuance of said notice, at public auction, to Samuel S. Slater, who was the highest bidder therefor, for the sum of \$5,000, the amount due and unpaid on said mortgage, being at that time about the sum of five thousand five hundred dollars.

Said attachment suits were commenced under the act known as the Water Craft Act, by the said plaintiff, on the 3d day of September, 1869.

QUESTIONS TO BE SUBMITTED TO THE COURT UNDER THIS STIPULATION.

First—Whether said claims upon which said attachment suits are brought, are liens upon the vessel, according to the laws of the State of Illinois?

Second—If they are liens, whether they are superior or subject to said mortgage.

It was further stipulated that the above stipulation should stand and take the place of pleadings, and that no further pleadings need be filed in the attachment suits, but the same should be deemed as fully at issue as if the facts therein had been pleaded in legal form, and issue joined.

The superior court decided that the attachment suits were liens upon the vessel, and overrode the lien of the mortgage. This is assigned as error.

Appellant makes several points ; the first of which is, that whatever rights these creditors may have had they have lost by their delay ; that they have permitted the vessel to make several voyages since a large part of the supplies were furnished.

There is no evidence to this point in the record, nor is it embraced in the stipulation, consequently it can not be considered.

The next point made is, that it does not appear that the several debts sued on, or any of them, were contracted "for materials, supplies, or labor in building, repairing, furnishing or equipping the vessel, or due for wharfage."

The statute of 1857 provides (section 1) that steam boats, and other water crafts navigating the rivers within or bordering upon this state, shall be liable for debts contracted on account thereof by the master, owner, steward, consignee or agent, for materials, supplies, or labor in building, repairing, furnishing or equipping the same, or due for wharfage." *Scates' Comp.* 789.

It appears to us, under this stipulation, the question of jurisdiction is not properly before us. Had there been pleadings in the cause, and they lacked those averments we deemed necessary in the case of *Williamson v. Hogan*, 46 Ill. 508, they would, of course, on the authority of that case, and the subsequent case of the *Tug Montauk v. Walker & Co.*, 47 Ill. 335, be adjudged defective, but by the stipulation it is very evident

all the facts necessary to give the court jurisdiction were considered as existing, and but two questions submitted: first, whether the claims are liens, and second, if so, have they priority over the mortgage? The question of jurisdiction we do not consider as before us by the stipulation.

Upon the point, were these claims liens :

It was said in *Williamson v. Hogan*, 46 Ill. 518, that as this act does not expressly create a lien, it would follow, a court of admiralty had no jurisdiction, and consequently the case was within the jurisdiction of the State court, for there must be a remedy somewhere, and the act of 1857 was passed to give one of a summary character, and the same language was repeated in the *Tug Montauk v. Walker*, 47 Ill. 335. On further reflection, we are satisfied the act of 1857 should be construed with the act of 1845, to which it is an amendment, and in which it is expressly provided that such debts shall have the preference of all other debts due from the owners or proprietors of boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of this State, except the wages of mariners, boatmen and others, employed in the service of such boats and vessels, which shall be first paid. By section six of this act, this "lien," as against other creditors and subsequent incumbrancers, or *bona fide* purchasers was lost, unless a suit to enforce it was brought within three months after the indebtedness accrued or became due, according to the terms of the contract. This time was extended by the act of February 9, 1855, to nine months.

These several statutes being *in pari materia*, that of 1857, under which the proceedings in the case cited were had, repealing no single provision of the others, must be construed together, and so construing them, a lien did in fact exist, and should have been so declared. In this case we must consider them as one and the same act, and must hold, on the authority of the case of *Germain v. The Steam Tug Indiana*, 11 Ill. 535, that a lien was created by the provisions of these acts in

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favor of these material men, and that it attached the moment the several liabilities were incurred. Such lien was acquired by force of the statute, and not by virtue of the levy and seizure under the warrants. They are the remedy prescribed for the enforcement of the lien, and do not create the lien.

No reference was made to this case, when the other cases were before us, nor is there now, but it has come to our notice in the necessary examination of authorities, and we must take it as our guide, satisfied, on reflection, it is the proper view of the statute, and that the act of 1857 must be considered in connection with that of 1845 and that of 1855, passed on the same subject, to which we have referred.

The remaining question is free from difficulty. The act of Congress providing for recording mortgages of vessels, is as follows: "No bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage etc., be recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Provided*, that the lien by bottomry on any vessel during her voyage, by a loan of money or materials necessary to repair or enable such vessel to promote a voyage, shall not lose its priority, or be in any way affected by the provisions of this act." The second section requires the collectors of customs to record all such mortgages, and all certificates for discharging and cancelling them in a book to be kept for that purpose. Section third requires them to keep an alphabetical index of such records, and of the vendee or mortgagee, and all to be subject to inspection during office hours, and shall, by section four, furnish certified copies of such records on the receipt of fifty cents for each mortgage.

The act of 1845 provides, in express terms, that such debts shall have the preference of all other debts, due from the owners or proprietors of a vessel, except the wages of mariners, etc., which shall be first paid. What is meant by this provision?

Was it designed to cut off judgments and mortgages, or only debts and demands for which there should be no prior lien? We think the latter only. And this seems to have been the opinion of the court in the case cited from 11th Ill., for there it is said that the remedy prescribed by the statute, which, although in some respects is a proceeding *in rem*, has not the conclusive effect of an admiralty decree. The court say, the fact that the legislature has provided a different remedy (from the one in admiralty), excludes any conclusion that it designed either to adopt the maritime remedy, or the consequences resulting therefrom; that under the statute, each lien holder must institute a distinct proceeding in order to enforce his lien; they are not even required to pursue their remedies before the same tribunal—one of them can not appear in a suit commenced by another, and assert his claim against the vessel. The court in which different actions may be pending against the same vessel, has no authority to consolidate them, but each progresses as an independent proceeding. It has no power to bring before it the various parties in interest, and, after ascertaining their respective rights, direct a sale of the vessel, and a distribution of the proceeds among them. It can only enter a judgment in favor of each attaching creditor, and award an execution for the sale thereof. The surplus, after the satisfaction of the particular judgment, would go to the owner of the vessel, without reference to existing liens. The purchaser takes the vessel subject to every subsisting lien of a superior class, and to those of the same class originating prior to the one on which the attachment was founded.

Finally, the court say, the sale of a vessel under a judgment in attachment obtained by a seaman or material-man, does not divest any liens of a superior degree, nor any antecedent liens of the same degree.

Were these proceedings against this vessel in an admiralty court, under the maritime law, where all persons interested have a right to appear, and are solemnly admonished to appear and protect their interests, liens of a superior degree, and

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antecedent liens of the same degree, would undoubtedly be cut off, but, as this court said, it is contrary to justice and equity to divest a man of his rights by a proceeding to which he is not a party, and in which he can not appear and defend them.

It is settled doctrine, that an attaching creditor or judgment creditor can not acquire any interest or right in the property seized against the interests of a *bona fide* lien holder, such lien being prior in time to the levy of the attachment or rendition of the judgment.

The record of the mortgage on this vessel was notice to all the world, and these claimants are bound by it. It is prior in time to their claims, and must prevail against them.

We have been referred to some cases not harmonizing with each other, which we do not think it is necessary to comment upon, as our opinion is based upon the case cited, believing this case is fully within the principles therein announced.

We therefore answer the second question in favor of the mortgage. The lien created by that must prevail over that of the material-men, and this reverses the judgment of the superior court.

The judgment is reversed and the cause remanded.

Judgment reversed.

SAMUEL S. SLATER

v.

GUSTAV FISHER.

WRITS OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

There were several distinct actions of replevin, all involving the same questions, which are considered in the following opinion.

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Messrs. RAE & MITCHELL, and Messrs. KING, SCOTT & PAYSON, for the plaintiff in error.

Messrs. MILLER, VANARMAN & LEWIS, and Messrs. HOYNE, HORTON & HOYNE, for the defendant in error.

MR. JUSTICE BREESE delivered the opinion of the Court :

These cases are actions of replevin, by the purchaser of the vessel under the mortgage sale, against the sheriff, and judgment must be rendered in favor of the plaintiff in replevin and in error, for the reasons given in the case of the *Barque Great West No. 2 v. Oberndorf et al. ante.*

Judgments reversed.

CHARLES H. MORTON *et al.*

v.

CHARLOTTE NOBLE.

1. DOWER—*whether barred by inoperative deed.* Where a deed from husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, or from any previous lien or incumbrance, or where the purchase money is recovered back for a defect of title in the husband, or by reason of any wrongful act on the part of the husband, the wife's dower in the land is not barred by the deed.

2. But where the husband and wife convey a perfect and indefeasible title, which is subsequently lost, solely by the fault and neglect of the grantee, the dower of the wife of the grantor in the land is not thereby restored.

3. As, where a party being seized in fee simple of certain land, he and his wife duly made, executed, and both acknowledged in due form of law, a deed conveying the title in fee simple to another, which deed was delivered but was not recorded until nearly a year thereafter, and subsequent to the execution of the deed and before it was recorded, a subsequent creditor of the grantor, there being no creditors at the date of the conveyance,

obtained a judgment against him, which became a lien on the land and the premises were sold under an execution issued on such judgment, the grantee in the deed failing to redeem from the sale but allowing the title to mature in the purchaser, it was *held* not essential to pass the right of dower that the deed should be recorded, and the title never having failed or been defeated by reason of any prior lien or incumbrance, or any act on the part of the grantor, but solely by the *laches* of the grantee in failing to record the deed, the right of dower in the wife of the grantor was forever barred.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

This was a petition for dower in certain premises, filed by Charlotte Noble; Charles H. Morton and Henry C. Clement, being made parties defendant. On a final hearing the court decreed according to the prayer of the petition, and the defendants appeal. The facts necessary to an understanding of the case are sufficiently presented in the opinion of the court.

Messrs. SLEEPER & WHITON, for the appellants.

Messrs. HOLBROOK & DALE, and Messrs. HIGGINS, SWETT & QUIGG, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

The appellee, by proof of her marriage with Noble, his death and seizin of her husband during coverture, having made out a *prima facie* case entitling her to dower, the question arises whether the defense set up by the appellants is sufficient in law to bar her dower.

From the stipulation as to the facts, it appears that Mark Noble, the husband of the appellee, was seized in fee simple of the land in which dower is claimed, and that on the 7th day of October, 1836, he and his wife, the appellee, duly made, executed, and both acknowledged in due form of law, a deed conveying the title in fee simple to Benjamin Harris, which

deed was delivered to Harris on the same day, but was not recorded until the 31st day of August, 1837. After the making and delivery of the deed to Harris, but before the same was recorded, one Jefferson Gardner recovered a judgment in the municipal court of Chicago, against Mark Noble, for the sum of \$251.56, which judgment became a lien on real estate on the 7th day of July, 1837. At the date of the conveyance to Harris the land was vacant and unoccupied, and such proceedings were subsequently had, that the premises were sold on an execution issued on the Gardner judgment, and Harris failing to redeem, the title matured in the purchaser at that sale, and the appellants now claim title through certain *mesne* conveyances as the grantees of the purchaser.

Mark Noble died in 1863, intestate, and the appellee filed her petition claiming dower in the premises.

It is not questioned that the deed of July 7th, 1836, was sufficient to release the right of dower if the title had remained in Harris, but it is insisted, that inasmuch as the title was defeated in Harris by reason of the sale on the Gardner execution, the dower is not barred, and the appellants, not connecting themselves with or claiming under the Harris title, can not set up the release of dower to him to defeat the demandant in this proceeding.

It will be observed that Harris obtained a perfect title to the land, free from all incumbrances. The title thus acquired remained in him for the period of about one year, and was only defeated by the *laches* of Harris, in not complying with the registry laws of this State, and by no fault or neglect of the grantor, Noble.

We fully recognize the doctrine, that when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, or from any previous lien or incumbrance, or where the purchase money is recovered back for a defect of title in the husband, or by reason of any wrongful act on the part of the husband, the dower is not barred by the deed. *Blain v. Harrison*, 11

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Ill. 384; *Summers v. Babb*, 13 Ill. 483; *Gove v. Cather*, 23 Ill. 634; *Stribling v. Ross*, 16 Ill. 122.

This case does not fall within the rule announced in any of the former decisions of this court. We have been referred to no case that holds that where the husband and wife conveyed a perfect and indefeasible title, and where the title was subsequently lost solely by the fault and neglect of the grantee, the dower would be restored. It is difficult to comprehend upon what principle such a doctrine could be maintained.

The doctrine of the cases cited above, rests upon sound reason. In case the title does not pass by the deed of the husband and wife, the dower will not, and hence the grantee takes nothing.

It is a familiar principle, that a widow can not release her right of dower to a stranger to the title, but in this instance the release was to the owner of the fee, and for that reason it was effectual. Harris was in no sense a stranger. By the deed from the demandant and her husband, he became vested with an absolute and indefeasible estate in the land. The title never failed. It was lost simply by the *laches* of the grantee.

There are many ways in which Harris, by mere neglect, could have allowed the title to pass from him. The land being vacant and unoccupied, he might have suffered a party to make an entry and hold possession for twenty years, until the right of possession had matured into an absolute title as against him. Had the title been lost in this way, it would hardly be insisted that the demandant in this case would be entitled to dower in the premises, simply by reason of the failure of Harris to assert his rights within the period fixed by the statute of limitations.

It is insisted, that Harris was not seized of the land as against the creditors of Noble, for the reason that the deed was not recorded in apt time. That was no concern of the grantor. It was not in his power to compel the grantee to place his deed on record. It does not appear that there were

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any creditors of Noble at the date of the conveyance. If the grantee chose to withhold his deed from record, the grantor could not prevent it. But it is not true that Harris was not seized of the land as against the creditors of Noble. He was in fact seized of an absolute title as against all the world, and held it for the period of one year, and might have continued to hold it forever, except for his own *laches* in not complying with the registry laws of the State.

We are of opinion, therefore, that the deed to Harris was effectual to pass the right of dower, and the title never having failed or been defeated by reason of any prior lien or incumbrance, or any act on the part of the grantor, the right of dower is forever barred.

For the reasons indicated, the decree of the superior court is reversed and the cause remanded.

Decree reversed.

JUSTICES WALKER and McALLISTER dissent.

THE HARTFORD FIRE INSURANCE COMPANY

v.

NANCY WILCOX.

1. **INSURANCE**—*verbal contract binding on the company.* A verbal contract to insure, based upon a sufficient consideration, and made by a party having an insurable interest in the property, with an agent having the requisite authority to bind his principal by such contract, may be legal and binding upon the insurance company.

2. **AGENT**—*when authority is conferred by writing, how his powers are to be ascertained.* It is a general rule, that where an agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and can not be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers; because that would be to contradict or vary the terms of the written instrument.

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3. But the doctrine in each case must be understood with the qualifications and limitations properly belonging to it, and the usages of a particular trade or business, or of a particular class of agents, are properly admissible, not for the purpose of enlarging the powers of the agents employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially commercial agents.

4. *SAME—enlargement of written authority—when shown by parol.* Although in general, the maxim is true, that where an express power is conferred by writing, it can not be enlarged by parol evidence—or an authority be implied where there exists an express one—yet the maxim is applicable only to cases where the whole authority grows solely out of the writing, and the parol evidence applies to the same subject matter at the same point of time, and therefore, in effect, seeks to contradict, vary or control the effect of the writing. Where parol evidence seeks to establish a subsequent enlargement of the original authority, or to give an authority for another object, or where the express power is engrafted on an existing agency, affecting it only *sub modo* to a limited extent, the maxim loses its force and application.

5. *SAME—where written authority of, is enlarged by the declarations and conduct of his principal.* And where there was a written authority to the agent, but the principal by his declarations and conduct has authorized the conclusion that he had in fact given more extensive powers to the agent than were conferred by the writing, then as to all persons dealing with such agent upon the faith of such apparent authority, the principal will be bound to the extent of such apparent authority.

6. *SAME—authority in writing—must be proved.* If the authority of the agent is in writing, the writing must be produced and proved.

7. *SAME—authority conferred on two or more—all must concur in its exercise.* It is a general rule of the common law, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal, only when all of them concur in doing it; for the authority is construed strictly and the power is understood to be joint and not several.

8. And where a commission vests power in two, without words of survivorship, and one of them dies, unless there is a subsequent recognition by the principal of the survivor as agent, his acts will not bind the principal.

APPEAL from the Circuit Court of Marshall county; the Hon. S. L. RICHMOND, Judge, presiding.

The opinion states the case.

Messrs. BANGS & SHAW, for the appellants.

Messrs. BURNS & BARNES, for the appellee.

MR. JUSTICE McALLISTER delivered the opinion of the Court:

This was an action of assumpsit, upon a verbal contract to insure the building of plaintiff.

Upon trial on issues of fact, a verdict was rendered against the defendants, on whose behalf a motion for a new trial was made, which was overruled by the court and exception taken. Judgment having been given upon the verdict, the case was brought to this court by appeal. The bill of exceptions embodies all the evidence, as well as the proper exceptions.

The errors principally relied on are: First, that no valid contract was shown; second, the court erred in excluding competent evidence offered by appellants.

As to the first point, it seems to be well settled by the authorities, that a verbal contract to insure, based upon a sufficient consideration, and made by a party having an insurable interest in property, with an agent having the requisite authority to bind his principal by such contract, may be legal and binding upon the insurance company. *Commercial Ins. Co. v. Union Mutual Ins. Co.* 19 How. (U. S.) 318; *Hamilton v. Lycoming Ins. Co.* 5 Barr, 339; *City of Davenport v. Peoria Ins. Co.* 17 Iowa, 276; *Bragdon v. Appleton Ins. Co.* 42 Me. 259; *Andrews v. Essex Ins. Co.* 3 Mason, 6; *McCullough v. Eagle Ins. Co.* 1 Pick. 278; *Palm v. Medina Ins. Co.* 20 Ohio, 529; *Trustees Baptist Church v. Brooklyn Fire Ins. Co.* 19 N. Y. 305; *Audubon v. The Excelsior Ins. Co.* 27 N. Y. 216.

The conversations out of which it is claimed the contract arises, occurred at the insurance office of one Green, at Lacon, Marshall county, Illinois, between Levi Wilcox, the son and acting on behalf of the plaintiff, and one Howard, in the absence of any other person claimed to be a representative of the defendants. The plaintiff's counsel did not seem to regard

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Howard's authority to bind the defendants of much importance; for the only evidence he introduced tending to show that he had any power to bind the company by such a contract, was the mere fact that he was at the time in Green's office, and no evidence was given by him that even Green was the agent of the defendants. The plaintiff's counsel having rested his case upon this slight evidence of authority in Howard, the defendants' counsel regarding it, perhaps, as some evidence, introduced Howard as a witness, who testified, that at the time in question he was a clerk in the insurance office of Green & Black, at Lacon. But Black had previously died. Being shown a commission issued by defendant, under its corporate seal to Green & Black, bearing date Aug. 3d, 1865, the witness identified and proved the same, and testified that this commission was the only authority under which they acted; that they had no authority to issue policies except according to the commission, and none outside of it.

The commission was then offered in evidence by the defendants' counsel; but upon general objection by plaintiff's counsel, the court ruled that it was not admissible in evidence, to which ruling exception was taken.

The commission offered is preserved in the bill of exceptions, and we find upon inspection of it, that it runs to Edward Green and J. Lincoln Black jointly, reciting that, reposing special trust and confidence in their ability and fidelity, they are, by authority of the board of directors, thereby appointed *agent* of the Hartford Fire Insurance Company, for Lacon, (Ill.), and its vicinity, with power to fix rates of premium, receive moneys and to countersign, issue and renew policies of insurance and to give leave (when they should deem it proper,) to transfer policies, on behalf of said company, subject to the rules of the office, etc.

The power of attorney contains no words of survivorship.

It is a general rule, that where the agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and

can not be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers; because that would be to contradict or vary the terms of the written instrument. In connection with this doctrine, it is often stated that an implied authority can not, in general, arise where there is an express authority in writing; for the maxim is, *expressum facit cessare tacitum*. Story on Ag. sec. 76 and note (1).

But the doctrine in each case, says that author, must be understood with the qualifications and limitations properly belonging to it. One of those qualifications is, that the usages of a particular trade or business, or of a particular class of agents, are properly admissible, not, indeed, for the purpose of enlarging the powers of the agents employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority, are included in the power, and may be resorted to by all agents, and especially commercial agents. Story on Ag. sec. 77.

In the next place, he says, although in general, the maxim is true, that where an express power is conferred by writing, it can not be enlarged by parol evidence, yet the maxim is applicable only to cases where the whole authority grows solely out of the writing, and the parol evidence applies to the same subject matter, at the same point of time, and therefore in effect, seeks to contradict or vary or control the effect of the writing. When parol evidence seeks to establish a subsequent enlargement of the original authority, or to give an authority for another object; or where the express power is engrafted on an existing agency, affecting it only *sub modo* to a limited extent, the maxim loses its force and application. Ibid. 79.

Another qualification is, where there was a written authority to the agent, but the principal, by his declarations and conduct, has authorized the conclusion that he had in fact given more extensive powers to the agent than were conferred by the writing; then, as to all persons dealing with such agent, upon the

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faith of such apparent authority, the principal will be bound to the extent of such apparent authority.

Subject to these reasonable qualifications and limitations, the doctrine is unquestionably true that an express written authority can not be enlarged by parol evidence, or an authority be implied where there exists an express one. Story on Ag. sec. 83.

It is laid down in 2 Greenlf. Ev., sec. 63, that, "If the authority of the agent is in writing, the *writing* must be *produced* and proved."

If it be conceded that the plaintiff had introduced *some* evidence of Howard's authority in the premises, or sufficient to submit to the jury, still, it will not be pretended that the defendants were not at liberty, by legitimate testimony, to destroy the force of this slight evidence by showing that in reality Howard had no authority or appearance of authority at all, to bind the defendants by such a contract. The first step in that direction was to show that he was a mere clerk under Green, and the only authority which the latter had was derived from a joint commission to Green & Black, and Black had died. Such being the state of the case, and in the absence of any evidence of recognition of Green's agency by the company, the only other competent evidence as to the question of power in the sub-agent, was the writing itself, which the court excluded, and the jury must have found their verdict upon the assumption, without evidence, that Howard was authorized to bind the defendants by the contract sued on. And if the commission which vests the power in two, without words of survivorship had been admitted in evidence, and it had appeared that one of them, Black, had died and this transaction had occurred before there was any subsequent recognition by the company of Green as the agent, then neither Green, nor, of course, his sub-agent, could have bound the defendants. "It is a general rule of the common law, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to

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be joint and not several." Story on Ag., sec. 42, and cases cited in note 2.

By the commission, Green & Black were appointed *agent*, and authorized to fix rates of premium, countersign, issue and renew policies. Under this authority, Green could not fix the rates of premium, countersign, issue or renew policies alone. If not, could he by any incidental or implied authority, make a verbal contract, as sole agent, to insure? If he could not, could a sub-agent acting only under him, and having no authority but such as was derived from that commission, make such a contract?

It is perfectly obvious, that, under the facts testified to by Howard, and not disputed, if the commission had been admitted in evidence, the plaintiff could establish a right of recovery only by the introduction of parol evidence, falling within some of the recognized qualifications to the general rule as to the effect to be given to a written authority, as above indicated in this opinion.

The evidence fails to sustain the verdict, and the court erred in overruling the motion for a new trial, and in excluding the commission and regulations referred to in it from the evidence; for which errors the judgment must be reversed and the cause remanded.

Judgment reversed.

ABRAHAM J. ROCKAFELLOW

v.

MARY A. H. NEWCOMB.

57	186
120	666
57	186
143	357
57	186
152	478
57	186
57a	289

57 186
87a 160

1. EVIDENCE—to prove marriage contract—express promise need not be shown. To prove a contract of marriage an express promise need not be shown. A mutual engagement may be inferred from constant and devoted attentions gladly welcomed, from reciprocal affection, and the interchange of letters expressive of earnest love.

Syllabus. Opinion of the Court.

2. *SAME—admissions.* Admissions of a party are never conclusive against him; and when made for the purpose of effecting a compromise of the matter in dispute, should be excluded as evidence, on the ground of public policy.

3. *CHANCERY—jurisdiction of to decree a reconveyance of land given in consideration of marriage.* Where land is conveyed in consideration of a marriage contract, and the grantee refuses to consummate the marriage, equity will decree a reconveyance. Marriage is a valid consideration for a deed.

4. *CONVEYANCE—undue influence used in obtaining, will avoid the deed.* Undue influence exercised by the grantee over the grantor to obtain a conveyance of real estate, resulting in a benefit to the former and a great disadvantage to the latter, will avoid the deed. As, where it was sought to obtain a reconveyance of land on the ground, as alleged by the complainant, that he executed the deed in consideration of a promise on the part of the defendant to marry him, which the latter refused to fulfill, it was *held*, that although the contract of marriage may not have formed the consideration for the deed, yet the proof showing that the grantee exercised an undue influence over the grantor in obtaining the deed, to the great benefit of the former and the great disadvantage of the latter, by reason of the close and tender intimacy between the parties, visits having been interchanged and loving letters passed between them, and the woman threatening to annul the marriage contract unless the trade was consummated, afforded sufficient grounds upon which to decree a reconveyance.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Messrs. BENNETT & VEEDER, and Mr. IRA O. WILKINSON, for the appellant.

Mr. DANIEL L. SHOREY, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellant filed his bill, in the court below, alleging, in substance, that he and appellee entered into a marriage contract, which she has refused to fulfill; in consideration of which, and induced by urgent and repeated solicitations, and her false

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and fraudulent representations, he executed and delivered to her a deed to a tract of land adjoining the city of Chicago, and known as the Hyde Park property in this record; and that appellee conveyed to him some Iowa land, not in consideration of the Hyde Park property; but, as she stated, to relieve her from continued annoyances on the part of her mother, who was constantly importuning her to convey the Iowa land to her brother Henry; that the Iowa land was worth about \$700, and the Hyde Park property about \$7000; that he tendered her a deed to the Iowa land; and praying that the deed executed by him be set aside, or appellee be compelled to reconvey.

Answer and replication were filed; and upon the hearing the court dismissed the bill.

Does the evidence sustain the allegation of a marriage contract, before, and subsisting at the time of, the exchange of deeds? We think it does. The deeds were executed and exchanged on the 21st of September, 1868.

Appellant testified, that by request of appellee he visited her on the 4th of July, 1868; remained two days; and they talked of marriage. In July again, and in August, he visited her, at her request, when she said she had no objection to the marriage, and had determined to marry him. Mutual visits were interchanged, and a correspondence carried on between them until the 10th of September. At this time she spoke of the trade, and said: "I wish you would make the trade you and Emily have been talking of so long." She wished him to have the Iowa land, to avoid the importunities of her mother in behalf of her brother Henry; that she would keep the deed to the Hyde Park property in her own hands, and not put it on record, and after the marriage both deeds should be destroyed. Thus urged, and upon such promise, he agreed to make the exchange. On the 19th of September he again visited her, and she informed him the deeds were ready. He declined to proceed further. She insisted and urged that, as she had promised not to record the deed, his refusal evinced an entire

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want of confidence in her, and the marriage need not be solemnized. He replied that he would execute the deed, upon her promise not to record it. She assented, and the deeds were signed on the 21st of September.

Appellee contradicts these statements to a great extent; and her sister Emily testified that the Iowa land was the consideration for the deed.

He is, however, very strongly corroborated. After she had refused to marry him, he, with his attorney, Mr. Bennett, had an interview with her, and tendered a deed for the Iowa land, and demanded a deed for the Hyde Park property, and said to her: "You know you agreed to keep the deed in your hands and not record it." She replied, "What if I did, and what if I didn't; what are you going to do about it? John Van Arman is my lawyer." Mr. Bennett distinctly recollects this language. In letters from appellee to appellant, in October, she said: "I have never had that deed recorded, though you accuse me, without any reason, of *forgetting my word*." "I have thought you had some regard for me; and that your happiness, in some measure, depended on me." "I feel so sorry on your account, a good deal more than on my own." "Try and forget this, and bestow your affections on another." "Is it possible that you would be willing to give me the place in your family that you proposed, &c." In a letter of appellant to appellee, introduced by her, of date August 31st, he said: "I could not see you often enough, but loved you too well. Now, dear Mary, this is the truth." "Permit me to come down on tomorrow's train, and receive me back to your heart." In one to Emily, dated October 8, he said: "Do you think it advisable for your sister Mary to come into my family? Mary says she loves me, and I think I do her." Mary McCorkle testified that in October, appellee informed her that she had determined to marry appellant. Harsh testified that, in speaking to appellee about the marriage, he said to her, "I thought there was a matrimonial difficulty;" she replied, "I guess that is so."

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Mr. Waite, in detailing a conversation with appellant, brought out by appellee, testified that appellant said he made the deed, supposing that he and Mary were to be married; they had been engaged for some time; she said as soon as they were married she would give up the deed; that the best way to quiet her mother was to make him a deed to the Iowa land, and he make a deed to her, so that the transaction would look right.

It seems that Emily Newcomb, sister of appellee, had been negotiating with appellant, about this trade, for more than a year prior to the courtship between the parties, and had failed in the accomplishment of her purpose. She resided in Chicago; appellee and her mother lived in Galesburg. The mother, probably without the knowledge of appellee, obtained the deed and sent it to Emily, who had it recorded. When this was done Emily purchased a part of the lot; she knew its value; owned property near to it; is a prominent actor in the entire transaction; and is a *quasi* real estate dealer in Chicago.

From the whole proof, the Hyde Park property, at time of the trade, was worth five thousand dollars; the Iowa land about seven hundred dollars.

We are satisfied that at the time of the trade there was a subsisting marriage contract between the parties. Their conduct and correspondence can not be explained upon any other hypothesis. The frequent visits; the intimacy for months; the numerous letters; the expressions of endearment, all prove the existence of the relation. An express promise need not be proved. A mutual engagement may be inferred from constant and devoted attentions gladly welcomed, reciprocal affection, and the interchange of letters expressive of earnest love.

What then was the consideration in the deed to the Hyde Park property? What induced its execution? The inequality in the value of the two pieces of property was too great to justify the conclusion that the Iowa land constituted the consideration. There was other cause—other inducement, of a

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stronger character. This man, with his fervid passion and strong love, was not well matched against an accomplished woman, in the incipient stage of their engagement. She requests, he demurs; she urges, he yields. The relation between the parties, and the consequent influence of the woman over the man, and the promise not to record the deed, but destroy it after marriage, make the real, the sole, consideration.

A marriage contract, then, was made. It was a contract which was valid and effectual in law. Marriage is a valuable consideration. There is no stronger consideration in law upon which to found a gift or grant. "Marriage contracts do not differ in principle from other species of contracts, where mutual and concurrent acts are to be performed." *Burks v. Shaine*, 2 Bibb, 341. The promise to marry formed the consideration for the deed. The refusal to marry destroyed the consideration.

This land is wrongfully withheld from the rightful owner. It is a fraud to retain the property, and not fulfill the contract. Blackstone (3 book of Com. 174) says: "Deforcements may also arise upon the breach of a condition in law, as, if a woman gives land to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the land. This is such a fraud on the man's part, that the law will not allow it to divest the woman's right of possession."

The party failing to comply has no right, either in morals or law, to property thus acquired. The contract was sacred, having the sanction of both Divine and human law. The party in default should not be allowed to reap benefits from its violation. This would disregard the long settled principles of equity jurisprudence.

From proper regard for the character of the woman involved in this controversy, we must hold that there was a mutual affection and engagement. Upon the opposite supposition her conduct would be abhorrent, and a trifling with the purest feelings of our nature.

Additional opinion of the Court.

In the negotiation the contest was unequal. A woman can always exercise an undue influence over the man she professes to love. We have no doubt that influence was exerted in this case.

We have examined the evidence in this case carefully, and have arrived at the conclusion that appellant is entitled to a reconveyance of the land.

The decree of the court below is reversed and cause remanded, with instructions to render a decree, that upon a reconveyance of the Iowa land to appellee, she reconvey the Hyde Park property to appellant.

Decree reversed.

Upon an application for a rehearing, Mr. JUSTICE THORNTON delivered the following additional opinion of the Court:

Application was made for a rehearing in this case. As it was persistently argued, we have carefully reviewed the evidence.

The objection is made, that all the testimony was not commented upon in the opinion of the court, and the conclusion is deduced that some portion was probably overlooked. It is impracticable, in numerous cases, to refer to all the evidence. Such practice would swell each opinion to almost a volume.

The portion of the testimony to which no allusion was made, was elicited from Mr. Harsh. In detailing a conversation with appellant, he stated: "Mr. Rockafellow was in my room, and I mentioned the matter of a compromise, saying that I heard Miss Newcomb say that he could have his deed back again. He said he did not want it back again, as that was a fair business transaction, and had nothing to do with their marriage; all he wanted of her was to fulfill their engagement. He then told me that they were engaged since the 4th of July, and that she had her wedding suit made and the day had been set."

Admissions are never conclusive. Besides, this admission may have been made to effect a compromise, and if so should have been excluded on the ground of public policy.

This witness had been talking with appellee about the marriage and the deed, and communicated a part of the conversation to appellant. A compromise was spoken of, and then the admission follows. This certainly weakens its force.

There is sufficient evidence to counteract the effect of the admission.

When the matter of the exchange was first talked of between the parties, it was introduced by appellee. She and her sister, Emily, had the deeds prepared. The next interview was on the 19th of September. Appellant then refused to consummate the exchange, and assigned various reasons for his refusal. Her reply was: "If there was not perfect confidence between us, there was no use of any further talk of our marriage." Why was the marriage referred to, if it had nothing to do with the exchange? If they were independent transactions the reference was absurd.

In October, appellant wrote to her, that if she had determined not to marry him she must return the deed, "which was made and given to her on that marriage contract."

At the interview at Knox College, appellant said to her: "You know the understanding on which that deed was made on the marriage contract, and that you agreed to keep the deed, and not let the same go on record."

Bennett, who was present, strictly corroborates appellant. Neither at the time of the interview, nor in her testimony, did appellee deny the version of this conversation, as stated by Bennett and appellant.

If there was no marriage contract previous to the 21st of September, the date of the deed, how can that assumption be reconciled with the language of appellant to appellee, in a letter of the 31st of August, introduced by appellee, in which he says: "I could not see you often enough, but loved you too well. Now, dear Mary, this is the truth. Permit me to come

Additional opinion of the Court.

back on to-morrow's train, and receive me back to your heart?" This language is fond, and expressive of a very near and dear relation between the parties.

The evidence is somewhat contradictory; the answers of witnesses sometimes evasive and equivocal; but upon a careful review of the whole record, we are satisfied that the contract to marry was the consideration for the deed of appellant.

Even if this were not true, a reconveyance of the property should be compelled. The relation between the parties was of the most confidential character. The sister, Emily, had essayed for years to negotiate the trade, and had failed. Appellant had always refused to consummate it. The courtship began; visits were interchanged; loving letters passed, and a close and tender intimacy had grown up between the parties.

During this state of affairs, appellee mentioned the trade; the fact that Emily had been trying so long to effect it, and requested that it should be perfected. This was assented to, but at a subsequent interview appellant positively declined to carry it out. The woman then felt and knew her power, and exercised it. She replied, "There is no use of further talk of our marriage." This accomplished the object. Appellant yielded and executed the deed.

She had an undue influence over him, and took advantage of the relation between them. That this influence existed, and was exercised to the great benefit of one, and to the great disadvantage of the other, there can be no doubt. There could be no other relation between persons, where a greater influence could be exerted, and an undue purpose more easily achieved.

The situation of the parties with respect to each other; the close intimacy; the loving correspondence; the threat to annul the marriage contract; the great difference in the value of the two pieces of property, all raise the presumption of undue influence.

She worked upon his passions, excited his fears, and alarmed him, by the dread of separation.

Syllabus.

The relief to be granted in such case, stands upon a general principle, which applies to all the variety of relations in which dominion may be exercised by one person over another.

The rehearing is denied.

Rehearing denied.

JOHN JACOB LINDAUER

v.

EPHRAIM H. CUMMINGS, Executor, and others, heirs of
FREDERICK N. EHRENFELS.

1. **MORTGAGE**—*whether a deed, absolute upon its face, is a mortgage—proof necessary to show.* In a proceeding in chancery to redeem a certain lot of ground from a mortgage, alleged to have been executed on the premises, to secure the payment of a debt owing by the grantor to the grantee, the deed being in form absolute, to change its character to that of a mortgage, it was held, to require clear proof that it was really but a security for the payment of the debt.

2. And evidence of loose declarations of the grantee in regard to his intentions was regarded as a dangerous species of evidence upon which to disturb the title to land, being extremely liable to be misunderstood or perverted, and the allowance of it for that purpose not in accord with the policy of the law requiring written evidence to attest the ownership of real property.

3. The kind of parol evidence properly receivable, to show an absolute deed to be a mortgage, is that of facts and circumstances of such a nature as in a court of equity will control the operation of the deed, and not of loose declarations of parties touching their intentions and understanding.

4. It has been held that evidence of such declarations alone, is insufficient proof to show an absolute deed to be a mortgage.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

57	195
242	512
57	195
167	384

Opinion of the Court.

Messrs. MILLER, VAN ARMAN & LEWIS, for the appellant.

Mr. SIDNEY SMITH, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This is an appeal from the decree of the Superior Court of Chicago, dismissing the bill filed in that court by the appellant, John Jacob Lindauer, against the appellees, to redeem lot 9 in block 98, in school section addition to Chicago, from a mortgage alleged to have been executed on the 9th day of July, A. D. 1860, by Lindauer, the then owner of the property, to Frederick N. Ehrenfels.

On the 9th day of July, 1860, Lindauer executed to Ehrenfels a warranty deed of said property, with full covenants.

On the 28th day of December, A. D. 1865, Ehrenfels died, leaving a will in which he named Ephraim H. Cummings and Sophia Ehrenfels executor and executrix. Sophia renounced, leaving Mr. Cummings the sole executor. On the 15th day of May, 1866, Lindauer filed his original bill, and on the 22d day of November, of the same year, filed his amended bill.

The amended bill alleges that Lindauer, on the 13th of October, 1856, being indebted to Ehrenfels in the sum of \$882, executed to Ehrenfels a promissory note, with a trust deed of this lot to O. R. W. Lull, trustee, to secure the payment of that sum, with interest at ten per cent, in one year from that time; that on the 1st of April, 1859, being indebted to Ehrenfels in the further sum of \$1,495, he executed a promissory note to Ehrenfels, together with a trust deed to Samuel Straus, as trustee, to secure the payment thereof, with interest at ten per cent per annum, in one year from the said first day of April; that on the 9th of July, 1860, Lindauer and Ehrenfels accounted together, when Lindauer was found to be indebted to Ehrenfels in the sum of \$2,800; that he was unable to pay the amount, and under the necessity of borrowing \$200; that Ehrenfels lent him this additional

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sum, thereby increasing his indebtedness to Ehrenfels to the sum of \$3,000, and that to secure the repayment of said sum, he conveyed said lot to Ehrenfels by a deed in the form of an absolute conveyance thereof, but upon the understanding and under an agreement with Ehrenfels that Ehrenfels should take charge of and rent said lot, and apply the rents which should accrue therefrom towards the payment of said sum, and that he should continue to rent the premises and thus apply the rents until he should deem it for the interest of Lindauer to sell the premises or until the indebtedness should be paid out of the rents, and in the event of his selling it he should apply the proceeds of such sale to the payment of said indebtedness, with interest, and pay over the balance to complainant, and in case the premises should not be sold, that he should reconvey the lot to complainant upon the payment of said indebtedness; that prior to this time the property had been improved by the erection of buildings thereon; that Ehrenfels accordingly took possession of said premises and kept them under lease and continued to receive the rents which accrued therefrom, to the time of his death, which took place December 28th, 1865; that the rents thus received by him, and by his executor since his decease have been more than sufficient to pay off said mortgage debt. Complainant asks for an account, offers to pay any deficiency, and prays to be allowed to redeem.

The defendant Cummings, in his answer, admits the execution of the notes of October 13th, 1856, and April 1st, 1859, and the trust deeds to Lull and Straus to secure payment of the same, and the execution of the deed of July 9th 1860, from Lindauer to Ehrenfels, but avers that the same was intended to be, and was, an absolute deed and not a mortgage, or subject to any parol trust; admits that said two notes remained unpaid up to the 9th day of July, 1860; denies that any principal or interest was paid thereon, or that usurious interest was claimed or allowed; avers that said notes were surrendered to Lindauer as part of the consideration for his

said deed, and that whatever money was paid was not as a loan, but also as part of the consideration for said deed; that at the same date of the deed Lull and Straus released the trust deeds; that afterwards, and on the 21st of June, 1865, Ehrenfels conveyed to Lindauer land at Rock Island Junction, in Cook county, then worth \$1,000, but upon no other or further consideration except the deed of July 9th, 1860, from Lindauer to him, so that complainant actually received in indebtedness surrendered and cancelled, additional cash, and the land at the Junction, \$4,000, as the consideration for his conveyance to Ehrenfels of said lot 9 in block 98, school section addition, which was executed in pursuance of an absolute and *bona fide* sale to Ehrenfels upon a full and fair consideration.

Sophia, Philip and Johannes Ehrenfels filed a similar answer, denying that the deed of July 9th, 1860, was intended as a security by way of mortgage; avers that it was intended for and was an absolute conveyance in pursuance of a *bona fide* sale, and denies all the equities of the bill.

The lot is situate at the corner of Sherman and Van Buren streets, in Chicago, being fifty feet on Sherman by one hundred feet on Van Buren. There were on it at the time of the execution of the conveyance of July 9th, 1860, two hotels or houses, known as the American House and the Wisconsin House.

The only questions are, whether this conveyance of July 9th, 1860, was in consummation of a sale of the property by Lindauer to Ehrenfels, and intended by both parties to operate as an absolute conveyance of it, or whether it was intended as a security for the repayment of money advanced by Ehrenfels to Lindauer; and if the latter, whether it has been discharged by a subsequent arrangement between the parties.

A deed from Ehrenfels to Lindauer, of the five acres at Rock Island Junction referred to in the answer, was in evidence, dated June 21, 1865, consideration \$1000, receipt of which is

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acknowledged, and deed of same property from Lindauer to Anna C. Eisle, dated March 5th, 1866.

Releases of the two trust deeds given to secure the two notes which Ehrenfels held against Lindauer, were executed at the same date as this deed of July 9, 1860, and we are satisfied from the testimony that the notes were not retained by Ehrenfels, but were surrendered up or cancelled.

From the date of that deed, Ehrenfels seems to have rented the property, received the rents, paid insurance and all taxes, assessments and water rents thereon; he paid Nov. 3, 1865, one assessment of \$1,141.60, for improving Van Buren street, to raise the money for which he was compelled to sell some of his other real estate; paid \$50 for a quit claim deed to cure a defective acknowledgment in the chain of title; made considerable repairs and improvements on the property; advertised it for sale, placed it in the hands of his agent, (Cummings), for sale, who placed his sign or board upon it, indicating that it was for sale by him; and there does not appear to be any testimony to show that Lindauer, from the date of this deed to the death of Ehrenfels, Dec. 28, 1865, ever exercised any acts of ownership, or made any claim to any interest in this property, or called upon Ehrenfels for any account in relation thereto.

The complainant offered evidence to show that \$3000 was an inadequate price for the property at the date of the deed, but we do not regard it as sufficient to affect the character of the transaction on that head. A number of his witnesses place the value of the property much higher than that, but defendants' witnesses, who appear for the most part to have better means of the knowledge of values than those of the complainant, pronounce that a fair price at the time, and Lindauer had put it into the market at that price, offered it to Ayers at that, and had concluded a bargain for it at that price with Schlecht, who would have taken it at that price, if Ehrenfels had not. Schlecht's subsequent offer of \$4000 was not, under the circumstances, a very satisfactory test of value, and a suspicion is excited as to its good faith, as he might easily have obtained the property

by taking a deed from Lindauer and paying or tendering to Ehrenfels his debt of \$3000, which would have extinguished his interest in the property, had his deed been such as is claimed ; and according to the testimony, Lindauer was desirous that Schlecht should have the property.

The deed in question is in form absolute. To change its character to that of a mortgage, it must be clearly proved that it was really but a security for the payment of a debt.

The proof by which the complainant undertakes to establish this consists, for the most part, of the loose declarations of Ehrenfels in regard to his intentions.

This is a dangerous species of evidence upon which to disturb the title to land ; it is extremely liable to be misunderstood or perverted, and the allowance of it, for that purpose, does not accord with the policy of the law requiring written evidence to attest the ownership of real property. The kind of parol evidence which is properly receivable to show an absolute deed to be a mortgage, is that of facts and circumstances of such a nature as, in a court of equity, will control the operation of the deed, and not of loose declarations of parties touching their intentions or understanding. It has been held, that evidence of such declarations, alone, is insufficient proof to show an absolute deed to be a mortgage. *Sutphen v. Cushman et al.* 35 Ill. 186 ; *Marks v. Pells*, 1 Johns. Ch. R. 594 ; *Kelley v. Bryan*, 6 Iredell, Eq. 287 ; *Aborn v. Bennett*, 2 Blackf. 101.

And so far as the evidence of admission goes, those of Ehrenfels in support of the claim of the bill, are about counterbalanced by those of Lindauer adverse to it.

The surrounding facts, and subsequent conduct of the parties, are in corroboration of an absolute sale, and many of the facts are repugnant to a subsisting relation of mortgagor and mortgagee.

The proof in support of the bill, seems to be vague and unsatisfactory.

But were the proof clear that the deed was but a security for a debt, we think the taking of the five acres of land at the Junction, should be held conclusive against the right to

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maintain this bill. It is insisted that there is no reliable proof connecting the deed of this five acres with the conveyance of this hotel property. But the testimony of Blickhahn, Klippell and Cummings, satisfies us that Ehrenfels conveyed to Lindauer this land, as a further compensation for the property in question.

It does not appear, with certainty, whether it was conveyed in pursuance of an agreement contemporaneous with the deed of July 9, 1860, and as a part of its original consideration, or as a gratuity induced by dissatisfaction in the mind of Lindauer, caused by the subsequent offer of the additional \$1000 by Schlecht for the property, or in satisfaction of the alleged equity of redemption. In regard to the value of this five acres, it seems to have been \$200 per acre in 1860; \$400 or \$500 per acre in 1865, and about \$1000 per acre in 1868; so it would appear to have advanced in value at about an equal pace with the property in question, and whenever it was taken, to have been about an equivalent of the additional \$1000 offer, made by Schlecht.

When the arrangement for the taking of it was made, is not certain. The date of the deed would indicate that it was made then, June 21, 1865.

But the deed might have been made in execution of a previous agreement of long standing, and the statement of Lindauer, in April, 1866, that he had had the land for quite a time, and had paid taxes on it for some years, would tend to show such to be the case; as would also the \$1,000 consideration expressed in the deed, which was much less than the value of the land at the date of the deed, and about its value in 1860.

But however this may have been, the result is the same. If the land was conveyed as a part of the original consideration, it is conclusive against the claim that this deed was intended as a mere security for debt. It could not be that a creditor would convey to the debtor property of such an amount, in consideration for a mortgage given only to secure the debt.

If the deed was originally intended as an absolute sale for \$3000, it would not be rendered less valid by the subsequent conveyance of this land as a gratuity.

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If the land was conveyed and accepted on account of and for a claim of an equity of redemption, we must give to it the force and effect of a full satisfaction and discharge of such claim.

We hold that the conveyance of this five acres of land, was intended for, and operated as, an extinguishment of all claim whatever of the appellant to the property in question.

The decree of the superior court is affirmed.

Decree affirmed.

DANIEL WANN *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS, for the use of
JOHN BIRK.

1. *GUARDIAN'S BOND—liability of the sureties thereon.* The sureties upon the general bond of a guardian are liable for the rents of the lands of the ward leased by the guardian, notwithstanding the requirement of section 135 of the chapter of the Statute of Wills, that the guardian, before leasing such lands, shall execute a special bond, conditioned faithfully to apply the moneys to be raised therefrom to the benefit of the ward. The giving of the new bond required by that section of the statute can not be construed as a release from ultimate liability of the sureties on the general bond.

2. So where a guardian leased the lands of his ward, under an order of court authorizing the leasing, and also requiring him to execute a bond conditioned for the faithful application of the moneys thus to be raised, to the benefit of his ward, the order being made in pursuance of section 135 of the Chapter of Wills, but the guardian failed to give the bond, it was *held*, the sureties on the guardian's general bond were liable to the ward, the guardian failing to account, and being insolvent, for the proceeds of the leased premises.

3. *SAME—action on—when may be brought.* Upon objection that a suit could not be maintained upon the bond, until there had been a settlement in the court of probate, an order by the court fixing the sum due and directing its payment, and a refusal by the guardian to pay, it was *held*, the guardian could not prevent an action on the bond by refusing or failing to

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render an account; that whenever he committed a breach of any of the conditions of the bond, he was liable to an action, and that, the declaration averring the removal of the guardian, the appointment of a successor, the making of an order by the probate court directing the guardian to pay and render to his said successor all moneys in his hands, with a breach that he did not so render and pay as directed by said court, on which breach issue was joined that he did render and pay to his successor, &c., it was immaterial under the issue whether he had had a final accounting with the court or not.

WRIT OF ERROR to the Circuit Court of Jo Daviess county;
the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The opinion states the case.

Messrs. D. & T. J. SHEEAN, for the plaintiffs in error.

Mr. WILLIAM CAREY, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This is a suit upon a guardian's bond, brought in the name of the people, for the use of one of two wards, the other having arrived at his majority and received his share of the estate. The circuit court rendered judgment against the defendants for \$8000, and they have prosecuted a writ of error.

The wards were the owners of certain lands in the county of Jo Daviess, which the guardian leased, under an order of court, and received as rent considerable sums of money. The order authorizing the leasing also required the guardian to execute a bond in the penal sum of \$1000, conditioned faithfully to apply the moneys to be raised to the benefit of the wards, the order being made in pursuance of section 135 of the Chapter of Wills. The guardian failed to give the bond, and the main question in this case, and indeed, the only one affecting the ultimate liability of the defendants is, whether the

sureties upon the general bond of a guardian are to be considered as not liable for the proceeds of leased land, in consequence of the special bond and security required by the statute to be given in such cases.

It is contended by counsel for appellants, that the legislature, by requiring the special bond, showed that the liability was not intended to be covered by the general bond, since, if it was so covered, no reason can be given why a special bond should have been required. This view is not without plausibility, but we do not consider the argument sufficiently strong to overcome the plain conditions of the general bond, taken in connection with the history of our legislation on this subject.

Section 135 of the Chapter of Wills was first enacted January 23d, 1829, being then section 130. But before that date, namely, on the 5th of February, 1827, the Statute of Guardian and Ward was enacted, under the title of "Minors, Orphans and Guardians," and by section 9 of that statute, guardians were authorized to lease the lands of their wards under the direction of the court of probate, and no new bond was required to be executed. The guardian in socage at common law, could lease the land of the ward and collect the rents, and the general guardian in this country would undoubtedly have the same right, independently of statutory provisions. Where, however, a statute requires an order of court authorizing such leasing, the order must be obtained in order to render the lease valid, but the power itself is none the less one of the recognized incidents of the office of guardian, the legislature having simply controlled the mode of its exercise. It is indeed one of the duties of such office, when the interests of the wards require their lands should be leased. The act of 1827 first regulated this power by requiring the authority of the court to be obtained. Then came the act of 1829, requiring, as an additional condition, that the guardian should give a special bond. This provision is in a different statute, and makes no reference to the existing law, and both provisions were re-enacted in 1845, the one in the Chapter of Guardian and Ward,

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authorizing the leasing on the order of court, without requiring a bond, and the other in the Chapter of Wills, requiring a bond.

But the Statute of Guardian and Ward has, from the beginning, prescribed, as one of the conditions of a guardian's bond, that he "shall faithfully discharge the office and trust of such guardian, according to law," and as another condition, that he shall "render and pay to such minor all moneys, goods and chattels, title papers and effects, which may come to the hands or possession of such guardian, belonging to such minor, when such minor shall be thereto entitled, or to any subsequent guardian, should said court direct." That moneys received from leased lands by the guardian, come to him by virtue of his office, and that such moneys, derived from the minor's lands, belong to the minor, are propositions which will hardly be denied, and it is equally undeniable that a guardian, who refuses or fails to account for such moneys, has not "faithfully discharged his office and trust," and has not paid to the minor or to his own successor, all moneys which have come to the hands of such guardian belonging to such minor. Language has no meaning unless, in such a case, the conditions of the bond have been broken. Prior to the enactment of the 135th section of the Statute of Wills, it would not have occurred to any one to deny, under such circumstances, the liability of the guardian and his sureties, upon his general bond. The case would have been within the precise letter and spirit of the statute, leaving no room for construction. The only change in the law since that enactment is the provision requiring a special bond, and the liability of the securities upon the general bond, remains as it was before, unless the mere requirement of a new bond and security is considered as clearly implying that the legislature intended the securities upon the general bond should no longer be held subject to a liability which would have attached to them, under existing statutes or at common law.

We should remember that repeals by implication are not favored. If the legislature had designed the result now claimed

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as flowing from the new enactment, it would have been very easy to say that the securities upon the general bond should not be liable for the rents. We must further remember, that the interests of fatherless infants are the object of a very just and tender solicitude on the part both of courts and legislatures. These helpless members of society are deprived of their natural protectors, and unless their property is hedged round by stringent legislation, and guarded vigilantly by the courts, it will too often become the easy prey of unprincipled avarice. With what reason, then, or upon what ground, can we hold, because the legislature has required another bond, they intended the ward should have no remedy upon the bond already given. Are we to indulge in a refinement of reasoning, and make the legislature say what it has not said, to the injury of a class the most helpless in the community, and, therefore, most entitled to the favorable consideration both of those who make and those who administer the law? Should we not rather say, and would it not undoubtedly be much nearer the actual fact, that the legislature intended to do simply what they have done, to wit, give to the infant the benefit of a new bond and increased security? Why the legislature deemed this necessary, we do not know, but we are certain they did not intend to impair the security already given to the ward by the guardian's general bond.

Counsel for plaintiff in error, cite *Lyman v. Conkey*, 1 Met. 317; *Mattoon v. Corning*, 13 Gray, 387; *Williams v. Morton*, 38 Maine, 47; and *Warnick v. The State*, 5 Ind. 350.

We can not regard these decisions as very much in point. Our statute requires the bond of the guardian to be for a sum double the amount both of the real and personal estate, thus showing the intention of the legislature to require security for all acts to be done by him in reference to either class of property, and recognizing the fact that he would have to deal with both classes. We have not at hand the statutes of Massachusetts, in force when these decisions were made, but it is apparent, from the opinions of the court, they are very different from

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ours. Under our statute, no person except the guardian can procure an order either to sell or lease the real estate of the minor. Under the statute of Massachusetts, it appears, from the opinion in the case cited in 1 Met. *supra*, that where the estate consists of a single messuage, so situated that a sale of part would injure the whole, or where it would be greatly for the benefit of the ward that the real estate should be changed into personal, an order of sale may be obtained, independently of the guardian, whether the sale is necessary for the payment of the debts or for the maintenance of the ward; and in both these cases the court says: "The authority is regarded as a special trust, superadded to that of guardian, and which, indeed, may be conferred on a person other than the guardian." The court says further, whenever the object is to raise a fund to stand in lieu of the real estate, for the future use of the ward, it is deemed a special, separate trust, and is not one of the general duties of guardianship, as it certainly would not be where the authority to sell can be given to a person not the guardian.

The case before the court was a sale of that character, and the court held the securities on the general bond not liable. The other cases cited from the Massachusetts and Maine reports, are all decided on the authority of this, and, like this, are all cases arising under a sale, and not a lease. Whether any distinction can be taken between a sale and a lease under our statute, we will not here inquire, but the decision of the Massachusetts court is clearly based upon the fact that the sale in question was peculiar in its character, and not belonging to the general duties of a guardian.

The case cited from 5th Ind., was where the guardian had sold the land of his ward, and the court held the original bond of the guardian was only designed, under the statutes of that State, to cover the personal and the rents of the real estate.

There is another view to be taken of this matter, which we deem worthy of a passing mention. Suppose no lease of the lands had been executed, but the ore had been dug by trespassers, and the guardian had recovered damages from them,

as it would have been his duty to do. These damages would have belonged to the wards, and if not accounted for by the guardian, we presume no person would doubt the liability of the sureties on his bond. In the present case, the guardian has not received money from trespassers, but from persons entering under an invalid lease, the guardian not having given the requisite bond. But the ore has been dug, and the proceeds have gone into his hands as in the supposed case of trespassers. The guardian does not account, and is insolvent. The wards have no special bond on which to bring a suit. Their money has been wrongfully appropriated, and yet they are to be told they have no remedy against the sureties, because the ore was dug under an invalid lease, though if dug without any lease at all, their remedy would have been complete. We must doubt the soundness of any reasoning which arrives at such results, or the wisdom of any decision which would thus refine away, by subtle distinctions, the security which the law designs to give infants against the malfeasance of their guardians. Counsel say this was an unlawful act on the part of the guardian, but it was done by virtue of his office, in reference to the property of his wards, and it is against just such unlawful acts that the law intends the infant shall be secured.

It is urged that no suit can be maintained upon the bond until there has been a settlement in the court of probate, an order by the court fixing the sum due and directing its payment, and a refusal by the guardian to pay. But the guardian can not prevent an action on the bond by refusing or failing to render an account. There are various conditions in the bond, and whenever he has committed a breach of any one of them, he is liable to an action. The declaration in this case avers the removal of the guardian, the appointment of a successor, the making of an order by the probate court directing the guardian to pay and render to his said successor all moneys in his hands, with a breach that he did not so render and pay, as directed by said court. To this breach the defendant pleaded that he did render and pay to his successor, &c.

Syllabus.

This was the only issue on this breach, and under this issue it was immaterial whether he had had a final accounting with the court or not. That he did pay to his successor, as averred in the plea, is not claimed on the argument. On the contrary, it was admitted on the trial he was insolvent, and the proof showed, without contradiction, that he was indebted to his ward for money received in a sum greater than the penalty of the bond.

The judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE SHELDON did not sit in this case, it having been tried before him while he was circuit judge.

SAMUEL HOLMES

v.

LEMUEL STATELER *et al.*

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201	*164
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1. CHANCERY—*jurisdiction of—to grant new trials at law.* It is only in cases that commend themselves strongly to equitable relief, that a court of equity will interpose to vacate a judgment at law; and though the power of the chancellor to control the courts of general jurisdiction, to set aside, modify and otherwise interfere with judgments at law, is now conceded and fully established, yet it is upon fixed and determinate rules alone that the jurisdiction will be exercised.

2. Judgments at law will not be vacated capriciously or as a mere matter of discretion, nor because the chancellor would, on the evidence heard in the suit at law, have arrived at a different conclusion from that reached by the jury.

3. Where a party has been brought into a court of law, and has had an opportunity of interposing a defense, and fails to do so, the repose of society requires that by the judgment then rendered the litigation should there end and the controversy terminate, unless by accident, mistake or fraud, the party has been prevented from interposing his defense, establishing his

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claim. And even though the judgment is manifestly wrong in law and in fact, or when allowing it to stand will compel the payment of a debt the defendant does not owe, unless it appears it was obtained by fraud or was the result of accident or mistake, relief in equity will not be granted.

4. Where, however, a party, after making every effort in his power to discover evidence, fails, upon its being afterwards discovered, a court of equity will treat this as an accident, and will, when satisfied that such evidence would have produced a different result, and that the judgment thus obtained is unjust and should not be paid, grant a new trial; but all these requirements must concur before it will interpose its power to afford relief. It must appear that the judgment is manifestly wrong; that the evidence has come to the knowledge of the complainant after the trial; that he had exhausted all reasonable means and efforts to discover it before the trial, and that it would, without a reasonable doubt, when introduced on a new trial produce a different result—it is not enough that the newly discovered evidence only renders it probable that a different result would follow.

5. The newly discovered evidence, to be availing, must not be cumulative merely

6. *INJUNCTION—assessment of damages on dissolution—continuance.* The proceeding by the court on the dissolution of an injunction, upon the party claiming damages by reason of such injunction suggesting in writing, the nature and amount thereof, to hear evidence and assess the damages is not a new proceeding, but follows as a part of the original proceeding, upon the dismissal of the bill and dissolution of the injunction; and if either party desire a continuance, he should show grounds for it in the usual mode, by affidavit.

7. *SAME—trial by jury.* In such proceeding it is discretionary with the court whether there shall be a trial by jury.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

The opinion sufficiently states the case.

Messrs. WEAD & JACK, for the appellant.

Messrs. RICHMOND & BURNS, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit in equity, brought by appellant in the Marshall Circuit Court, against appellees, for the purpose of

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obtaining a new trial at law. The venue was subsequently changed to Peoria county. The bill alleges that the defendant Stateler, in February, 1858, obtained a judgment at law against complainant, for \$400, which he claims is unjust and wrong; that the verdict was procured by fraud, perjury and forgery; that the complainant was guilty of no negligence in defending the suit; that it was out of his power to successfully defeat it upon the trial thereof; and that he can, by means of evidence not then known to him, and then beyond his reach, and out of his power to obtain on that trial, reverse the judgment, if a new trial be ordered.

Appellees answered, admitting the proceeding in the suit at law, as set up in appellant's bill, but denying all the material allegations upon which relief was prayed. The evidence on the former trial and proofs since taken to sustain the bill, were heard on the trial, when the court below dissolved the injunction and dismissed the bill. Thereupon appellees filed suggestions of damages from the wrongfully suing out of the injunction, and the court rendered a decree for two hundred dollars damages. The case is brought to this court on appeal, and errors assigned on the record.

It is only in cases which commend themselves strongly to equitable relief, that the chancellor feels at liberty to interpose his power to vacate the judgment of a court of law. It was after a long and bitter struggle, that the common law judges yielded and conceded even the power of the chancellor to control the courts of general jurisdiction, or to set aside, modify, or otherwise interfere with judgments at law. But the power is now conceded and fully established. Yet it is upon fixed and determinate rules alone, that the jurisdiction will be exercised. It will not be done capriciously or as a mere matter of discretion, nor because the chancellor would, on the evidence heard in the suit at law, have arrived at a different conclusion from that reached by the jury. And the court will not usually interpose to grant a new trial unless there has been accident, mistake or fraud, which has produced the result. *Buckmaster*

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v. *Grundy*, 3 Gilm. 626; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *How v. Mortell*, 28 Ill. 478. In the second of these cases it was said, a party can not ask for relief in equity on the ground that he has failed or omitted to make a defense at law, even when the judgment is manifestly wrong in law and in fact, or where by allowing it to stand, will compel the payment of a debt the defendant does not owe, unless it appears that it was obtained by fraud, or was the result of accident or mistake. See, also, *The State Bank v. Stanton*, 2 Gilm. 352.

Where a party has been brought into court and has had an opportunity of interposing a defense and fails to do so, the repose of society requires, that by the judgment then rendered, the litigation should then end and the controversy terminate, unless, by accident, mistake or fraud, the party has been prevented from interposing his defense or establishing his claim.

Where a party, however, after making every effort in his power to discover evidence fails, upon its being afterwards discovered, courts of equity treat this as an accident, and will, when satisfied that such evidence would have produced a different result, and that the judgment thus obtained is unjust and should not be paid, grant a new trial, but all these requirements must concur before it will interpose its power to afford relief. It must appear that the judgment is manifestly wrong; that the evidence has come to the knowledge of complainant after the trial; that he had exhausted all reasonable means and efforts to discover it before the trial, and that it would, when introduced on a new trial, produce a different result.

In this case John B. Stateler's deposition was taken about four years before the trial, to say nothing of the two previously taken, one of which was near two years previous to the last. By these depositions, appellant was fully apprised that the witness would swear to what is now claimed to be false, and which it is proposed to contradict. This was a long period of time within which to discover evidence to disprove what he knew was untrue, and this, too, when the name of the witness was given, by whom he proposes to prove its falsity, and not only so,

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but the witness distinctly states in his deposition that the last time he saw Evans he was on his way to Oregon. Appellant does not seem to have been very active during all this time in his efforts to learn where the witness resided. He, it seems, procured two of his neighbors to write for him to Iowa, Ohio and California, to learn his residence. They seem to have written to his relations or friends, but the time when, or how often, does not very definitely appear. He does not seem to have employed an attorney or agent in Oregon to inquire for his residence. Such an agent, at the seat of government, could readily, through the postmasters in that State, have learned his place of residence, or had information been asked through the newspapers of the State, the search would in all probability have proved successful. Other means that will readily suggest themselves, could have been employed, with moderate expense, that would probably have discovered the desired information. We, therefore, are of opinion that appellant has failed to show the necessary diligence to entitle him to the relief sought.

Again, the newly discovered evidence must not be cumulative. In this case, appellant introduced, as we see from the bill of exceptions, when the trial was had at law, the evidence of a number of witnesses and the statements made by appellees, to contradict John B. Stateler's evidence in reference to the loan. And all that can be claimed for the evidence of Evans, is, that it would contradict John B. Stateler on that point. If, then, it should be admitted on another trial, it would only add to or accumulate the evidence on that point.

An examination of the affidavit of Evans, and the deposition of Stateler, do not show an absolute contradiction. Stateler says that Evans was present when his brother loaned the money to appellant. Evans says he did not see the money loaned, nor did he see appellant. It will be observed that Stateler nowhere says that Evans saw the money loaned, or saw appellant. Evans might have been present and neither have seen the money loaned nor have seen appellant. It is not pretended he was not in the city of Sacramento and in

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daily intercourse with the Statelers at the time fixed by Stateler when the money was loaned. This being so, we can not say that another jury would arrive at a different conclusion, and unless we could believe they would, without reasonable doubt, a new trial should not be granted. The evidence would no doubt be conflicting, and it would be for a jury to consider it and determine on which side the weight inclined. Before a new trial will be granted in equity, it should appear, with reasonable certainty, that a different verdict would result. It is not in every case where new evidence is discovered, or when such evidence only renders it probable that the jury would find a different verdict, that the relief should be granted. To do so, would authorize it in all doubtful cases, where courts of law always refuse to grant a new trial. On this ground we are of opinion that a new trial should not be granted.

The fact proposed to be disproved by Evans, is in its nature collateral. If the money was loaned, what does it matter whether Evans was or was not present? If loaned, as claimed, appellant should pay it whether Evans saw it loaned or not, as that fact would not affect its justice. The evidence is not direct to the issue in the case.

It is again insisted that the court below erred in refusing to continue the suggestions for damages, on the motion of appellant. We do not understand the statute as intending to give, as a matter of right, a continuance on the suggestions, to either party. This proceeding follows as a part of the original proceeding, upon the dismissal of the bill and dissolution of the injunction. It is not a new proceeding. If either party desire a continuance, he should show grounds for it in the usual mode, by affidavit.

Nor is the objection well taken, that a jury trial was refused. It was a part of a proceeding in chancery, where trial by jury is not a matter of right. It is only discretionary with the chancellor, whether there shall be formed an issue of fact to be tried by a jury. It is not an answer to say that it involves the rendition of a decree for damages. This court and the circuit

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courts have rendered judgments for damages on the dismissal of appeals, for more than a quarter of a century, without the right being questioned. And on the dissolution of an injunction, restraining the execution of a judgment, such damages have been awarded under the statute for a much longer period without the right being questioned, so far as our observation has extended.

But appellant certainly waived all right to question the action of the court in that regard, when he consented that the decree should be rendered for two hundred dollars. That agreement amounted to a confession of the decree for that sum. We perceive no error in this record, and the decree is therefore affirmed.

Decree affirmed.

JOHN D. EASTER

v.

THE FARMERS' NATIONAL BANK OF SALEM.

1. PARTNERSHIP—*contracts in the firm name entered into by one of the partners after dissolution, whether binding on the others—notice of dissolution.* As a general rule, after a dissolution of a partnership neither partner can make a new contract in the firm name binding on the others, without express authority, and no note, draft or acceptance so executed in the name of the firm will be valid if the party with whom the contract is made had notice of the dissolution.

2. SAME—*authority of one partner to use the firm name after dissolution—how may be given.* Written authority, to authorize one of the partners to use the firm name after the partnership is dissolved, so as to be binding on all, is not required—it may be given by parol. And there are cases which go to the extent of holding that such authority may be inferred from the acts of the parties.

3. EVIDENCE—*of such authority.* In a suit on a promissory note, executed by one partner, in the firm name, after the dissolution of the firm, it

was *held*, the mere fact that the other partners had for some reason paid certain other notes executed by him in the firm name after the dissolution, did not of itself furnish sufficient evidence of authority in such partner to execute the note in question.

4. NOTICE—*what constitutes*. Where the president of a bank had knowledge of the dissolution of a partnership: *Held*, that notice to him constituted notice to the bank.

5. PARTNERSHIP—*unauthorized use of firm name after dissolution—ratification of*. Where one partner, after the dissolution of the partnership, uses the firm name without authority, his act may be subsequently ratified by the others, and the contract will be as binding on them as though their consent had been previously given for that purpose.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit, brought by The Farmers' National Bank of Salem (Ohio), against John D. Easter, Elijah H. Gammon and A. T. Bates, former partners, on a promissory note, signed in the firm name of Easter, Gammon & Bates. A trial in the court below resulted in a judgment against two of the defendants, Easter and Bates, for the amount of the note, with interest, from which judgment Easter appeals. The opinion of the court contains a sufficient statement of the facts.

Messrs. WEST & BOND, for the appellant.

Mr. J. N. BARKER, Mr. WILLIAM HOPKINS and Mr. T. J. TULEY, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The note sued upon was executed by Bates, one of the partners, in the name of the firm of Easter, Gammon & Bates, and it is not denied that prior to its execution the partnership was dissolved. In fact, the firm was dissolved before the execution of the note for which the note now in controversy was given in renewal.

It is not doubted that after a dissolution of a co-partnership, one partner can not use the firm name for the purpose of creating an indebtedness, without the express authority of the other partners so to do. It is entirely competent for the partner whose name has been used without his authority, after the fact has been done, to ratify the same, and it will be as binding as though the consent had been previously given for that purpose.

The only questions involved in this case are, whether Easter ever gave Bates any authority to execute the note now in controversy, in the name of the firm, or whether he ratified the act after he learned the use that had been made of the firm name.

It appears that at the time of the dissolution of the firm of Easter, Gammon & Bates, on the 1st of January, 1867, the firm had on hand a lot of machines called "fair machines," bought or received of Rank & Co., about which there was a dispute between the parties as to whether the machines were manufactured in accordance with the terms of the contract under which they were received. The dispute led to unfriendly relations between Easter and the firm of Rank & Co. Easter insisted that the machines were not manufactured according to the contract and that he would not pay for them. It seems that Mr. Brooks, of the firm of Rank & Co., was in Chicago, in December, 1866, and at that time had some understanding with Mr. Bates that he should take the machines and pay for them. Accordingly, in pursuance of that understanding, Bates, soon after the dissolution of the firm, went to Salem, and there, on the 18th of January, 1867, made a settlement with Rank & Co. of the difficulty about the machines. It was then agreed that Bates should take the machines and pay for them. The firm of Rank & Co. were then notified of the dissolution of the firm of Easter, Gammon & Bates. When the parties came to close up the matter, Bates offered to give his own paper, but Rank & Co. declined to receive it, and insisted upon having a firm note, and thereupon Bates executed to Rank & Co., notes to the amount of \$35,000 in the firm name of Easter, Gammon & Bates, being for the value of the unsold machines then turned

over to Bates; at the same time Bates required Rank & Co. to execute a paper releasing Easter from liability on account of the notes. Such a paper was executed and delivered to Bates, but was never delivered to Easter. Two of the notes executed by Bates on the 18th of January, 1867, were for \$10,000 each and three were for \$5000 each. Something was paid on one of the \$10,000 notes, and Bates subsequently executed a new note in the firm name of Easter, Gammon & Bates, for the sum of \$5410.05, for the balance due on that note, and sent it to Rank & Co. This last note was discounted by appellee for Rank & Co. The note was again renewed by Bates, in the firm name, after it was in the hands of the appellee, and this is the note now in controversy.

It appears that Mr. Brooks, who was a member of the firm of Rank & Co., is also president of the "Farmers' National Bank of Salem," the appellee. It is not questioned that Mr. Brooks had notice of the dissolution of the firm of Easter, Gammon & Bates, before the execution of the note discounted by the bank, and notice to him must be held to constitute notice to the appellee, of that fact. In addition to the notice to the president of the bank, the cashier also testified that he probably had notice of the dissolution of that firm before the renewal of the note. The appellee, therefore, having had notice of the dissolution of the firm of Easter, Gammon & Bates, it was for it to inquire what authority, if any, Bates had for using the firm name. If the bank failed to make such inquiry after notice, and Bates had no authority to use the firm name, it must suffer the consequences of its own neglect in that regard.

What agreement or understanding was had between the members of the firm of Easter, Gammon & Bates, at the time of the dissolution, or afterwards, in regard to closing up the business of the firm, this record does not expressly show. It certainly does not affirmatively appear by any direct evidence, that Bates was ever authorized to use the name of the firm in liquidation or otherwise.

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It is insisted that this authority need not be expressly given; that it may be implied or inferred from circumstances. Written authority is certainly not required. It may be given by parol, and there are cases that go to the extent of holding that the authority may be inferred from the acts of the parties. *Smith v. Winter*, 4 M. & W. 454; *Graves v. Mery*, 6 Cow. 701.

The general rule, however, is, that after a dissolution of a partnership, neither party may make a new contract in the firm name, binding on the others, without express authority, and no note, draft or acceptance executed in the name of the firm, will be valid unless executed by all the partners, if the party with whom the contract is made had notice of the dissolution. *Ellis v. Bronson*, 40 Ill. 455.

We are unable to discover any evidence of facts in this record, that would estop Easter from denying that the note was executed in the firm name with his consent, nor do we find any clear and distinct evidence that he ever ratified the act after it came to his knowledge, or that he did any act that misled the parties to their injury.

It is insisted that Easter ratified the settlement made by Bates in January, 1867, and from that fact it is urged it may be inferred that he consented to the use of the firm name in the execution of the notes, and that that consent would be continued to the several renewals. We do not so understand the evidence. Bates positively states that the arrangement was made for his own benefit, and Easter expressly denies that he ever ratified the settlement. Even Mr. Brooks, when inquired of whether Easter ever ratified the settlement made by Bates in January, 1867, answered in the negative, and the context does not show to the contrary. The record imports verity, and the suggestion of counsel that some error has crept into the record on that question can not be considered.

It is further insisted, that Bates, when he returned to Chicago told Easter what he had done, and that Easter ought not to have remained silent. Exactly what information was imparted to him on the return of Bates, the evidence does not disclose,

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but we are informed that he was then told that Rank & Co. had released him, and that fact is sufficient to explain his silence. If he was released, he need concern himself no further.

Another fact relied on is, that Easter and Gammon subsequently paid two notes, executed in the name of the old firm by Bates after the dissolution of the firm. The explanation of this transaction furnished by the evidence, is, that one of the notes for some reason not explained was renewed in the individual names of the partners, and the other was indorsed by Gammon. If, for any reason, they felt under obligations to pay these notes, that fact does not, of itself, furnish sufficient evidence of authority in Bates to execute the note now in question in the firm name.

We are, therefore, of opinion that the evidence fails to show that Bates had any authority to use the firm name for the purpose of executing the note on which this action is brought, or that Easter, after he had learned the use that had been made of the firm name, ever ratified the act or did anything that would mislead the parties to their injury. The appellee, through its president, Mr. Brooks, and the subsequent knowledge of the cashier, had sufficient actual knowledge of the dissolution of the firm, and of all the facts, before it discounted the note for the benefit of Rank & Co., and, having had such notice, it was its duty to inquire what authority, if any, Bates had to execute the note in the name of the firm, and if it failed to do so, the consequences are the result of its own neglect.

If the testimony of Bates is to be relied on, the notes were originally given, and the renewals made, for his own debt, and for his benefit, and not for the debt or benefit of the old firm.

We are not satisfied with the finding of the court, on the evidence preserved in the record, and for the reasons indicated the judgment will be reversed and the cause remanded.

Judgment reversed.

JOHN GRAY *et al.*

v.

SMITH MOREY.

EVIDENCE—*declarations of a party, whether admissible in his favor.* In an action of replevin to recover a lot of cattle taken on execution, there was evidence tending to show the cattle were owned jointly by the plaintiff, and the defendant in the execution: *Held*, that declarations of the plaintiff, out of court, not under oath, and in the absence of the defendant in the execution, were inadmissible as evidence to enable the plaintiff to make out title in himself to the property in dispute.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Mr. C. F. REMICK, for the plaintiffs in error.

Mr. E. W. EVANS, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of replevin, for certain cattle, brought by the defendant in error, against John Gray, sheriff of Cook county, and others, the property in question having been seized on an execution in favor of one Misner, and against one Gilbert Follansbee, as the property of Follansbee.

The cattle were shipped by Follansbee, at Sandwich, to himself, at Chicago, and, when levied upon, were in his possession there. Morey brought this suit to recover the cattle, claiming to be the owner of them.

One error assigned upon this record, is that of allowing the witness Sheppard, to testify to what the plaintiff himself had said in his own interest, in Follansbee's absence.

The other testimony in the case tended strongly to show that the cattle were purchased and shipped by Follansbee & Morey together, on joint account. The witness Sheppard testified that a few days before the cattle were shipped, Morey applied to him for some money to ship some cattle, and then said, that he had a few bought, and that he was "going on his own hook;" and in answer to the question, what did Morey say as to Follansbee's interest, the witness replied, "I understood he was not going in any partnership with Follansbee, in this load of cattle."

The evidence of these statements of Morey, the plaintiff, in his own favor, was admitted against the objection of the defendants, and must have had a material bearing upon the case.

Declarations of a party out of court, not under oath, are not to be received for him, to enable him to make out title to the property in dispute.

And we fail to see how their admission in this case could be justified on the ground claimed of their being declarations accompanying an act.

For this error, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

57	222
175	556

HAMILTON C. DANIELS *et al.*

v.

DANIEL B. HEARTRUNFT *et al.*

In this case the decree, not being sustained by the evidence, is for that reason reversed.

APPEAL from the Circuit Court of DuPage county; the Hon. SILVANUS WILCOX, Judge, presiding.

Opinion of the Court.

This was a bill in chancery, filed by Daniel B. Heartrunft and others, against Hamilton C. Daniels and Allen C. Yundt. Upon a final hearing, the court decreed according to the prayer of the bill. The defendants appeal.

The opinion of the court contains a sufficient statement of the case.

Mr. H. G. MILLER, Mr. HIRAM H. CODY and Messrs. VAN ARMAN & VALLETTE, for the appellants.

Messrs. HURD, BOOTH & KREAMER, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit in chancery, to compel the execution of an alleged trust, in favor of the complainants in the court below, in respect to the sum of \$3080, in the hands of Daniels, the proceeds of a certain promissory note deposited in his hands by Yundt, on the 30th day of April, 1864.

Mary Ann Heartrunft, the sister of Jacob Becker, and the mother of the complainants, having had an abortion, Becker, in the presence of Daniels, accused Yundt with complicity in procuring the same, and threatened his arrest for it. This was on Saturday evening, and Yundt, being compelled to go to Chicago on the Monday following on business, deposited the note in question in the hands of Daniels. On what terms and conditions the note was so deposited, is the sole point in controversy.

Mrs. Heartrunft was not then expected to recover from her sickness, and she died on the next day.

No person was present when the agreement under which the note was deposited, was made, except Daniels, Becker and Yundt, and they alone were originally acquainted with the terms and conditions of the agreement, and all evidence of the trust must be derived from them.

Yundt swears, that the note was placed in Daniels' hands only as security for his (Yundt's) return from Chicago, on the Saturday night following.

Daniels swears, that it was placed in his hands as security for such return of Yundt, and also, that Yundt should pay up all the expenses of the sickness and funeral of Mrs. Heartrunft, in case she died, and for no other purpose, and explicitly denies that it was placed with him for the support of the complainants.

Becker testifies, that the note was put up to secure the payment of said expenses, and to support the complainants.

Yundt returned from Chicago to Naperville the following Saturday night, and met Becker and Daniels at the office of the latter, and, according to the testimony of Daniels and Yundt, the latter remarked that he was back again, and Becker asked if he was ready to pay those expenses. Yundt inquired how much they were. Becker figured them up at \$170. Yundt said he would not pay them, and Becker said he would arrest him, then. Yundt demanded his note; Daniels told him he could not have it until he paid the expenses. Yundt said he would "sue it out of his hands." Becker told Daniels not to give up the note until Yundt paid the expenses. Daniels swears, that, at that time, no one claimed that the note was for the support of the children, and that if Yundt had paid the funeral expenses he should have given up the note to him.

Almost immediately after the deposit of said note, Mrs. Heartrunft died, and a *post mortem* examination was held for the purpose of ascertaining the cause of her death.

On this occasion, all three of these witnesses were sworn and examined, and testified fully in reference to the deposit of the note with Daniels, and the object and purposes of such deposit. Separate minutes of the testimony given then, before the coroner's jury, were taken by two different persons, and have been preserved.

Becker's testimony at that time, in speaking of the agreement to deposit the note, was, "He (Yundt) agreed to pay all expenses, and he forfeited a note of \$3,000 if he did not return by

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Saturday night, and pay all expenses and settle the matter up." The testimony of Daniels and Yundt was the same then, as now.

It appears that when these three witnesses were thus brought together and examined in each other's presence, within ten days after the transaction, neither of them intimated that the contract provided in any way, for the maintenance of the complainants; and the only disagreement between them was, between Yundt upon one side, and Daniels and Becker on the other, which was merely as to Yundt's obligation to pay said expenses.

It is true, it does not appear that they were asked to state whether Yundt agreed to put up the note as security for the support of these complainants, nor does it appear that they testified negatively, that such was not the agreement of Yundt. They were, however, required to, and did, each in turn, state the terms of the agreement in reference to the note; and when a witness is required to state the terms and conditions of a contract, and proposes to do so, he must be understood to state all of its terms. The fair import of the testimony of Becker, given on that occasion, is in disproof of any such trust as is here alleged, and in contradiction of his present testimony.

It must be admitted that the statements of this witness at that time, given under the same sanction and solemnity as his testimony in this case, made while the event was recent, and the matter fresh in his recollection, and before his feelings had become enlisted, as they evidently have become since, must be more reliable as evidence than his impressions recalled after so great a lapse of time.

There is the testimony of several witnesses as to their having heard certain statements made by Daniels, more or less contradictory to his testimony in this case.

This evidence, of course, can not be considered as against Yundt; its only influence is, upon the credibility of Daniels as a witness.

Syllabus.

Such testimony, consisting in the repetition of oral statements, is subject to much imperfection and mistake, and ought to be received with great caution; and it is sufficient to say of it in this case, that we do not deem it sufficient to overcome the force of the sworn statements of the witness Daniels.

As to the testimony of Daniels before the coroner's jury, it is obvious that the testimony of Williams and Cody, aided and refreshed by the full minutes of it, which they at the time took, and have preserved, is more satisfactory evidence of what it was, than the testimony of the impressions of other witnesses as to what Daniels testified to.

After a careful examination of the proofs in the case, we have come to the conclusion that the decree is not sustained by the evidence.

The decree is reversed, and the cause remanded for further proceedings in conformity hereto.

Decree reversed.

CHARLES R. O'CONNER *et al.*

v.

JOHN L. WILSON *et al.*

1. SHERIFF'S RETURN—*leave to amend.* Held, the true rule of practice is, that the court should grant leave to a sheriff to amend his return to process as a matter of course, and without notice to the party to be affected by it, only during the term at which the cause is determined.

2. SAME—*former decisions.* The cases of *Turney v. Organ*, 16 Ill. 43, *Dunn v. Rodgers*, 43 Ill. 260, *Moore v. Purple*, 3 Gilm. 149, and *Morris v. The Trustees of Schools, &c.*, 15 Ill. 266, in so far as they announce a different rule, modified.

57	226
143	344
57	226
55a	210
58a	372
57	226
94a	1258
57	226
196	7566
57	226
102a	8447

Syllabus.

3. **SAME—*laches*.** Where the application to amend was not made until nearly twelve years after the date of the return, it was *held*, that after the lapse of so long a time leave to the officer to amend his return should not be granted.

4. **SAME—*amendment of—by whom to be made*.** Where the return of service, upon a summons, made by a deputy sheriff, who had since died, was thought to be defective, it not appearing that his principal was present at the execution of the writ, and cognizant of the manner in which the service was made, and there being no sufficient memorandum made by the former at the time the service was had by which the amendment could be made, it was *held*, incompetent for the latter to amend the return.

5. **Inasmuch as the return to process can only be amended by the facts, the amendment should be made by the officer who served the writ and knows the facts, or if by his principal, then from a memorandum made by the deputy at the time he served the writ, and which clearly and unmistakably states the facts omitted in the return.**

6. **SAME—*presumption as to who served the writ*.** It will be presumed that the officer making a return served the writ or did what the return states was done. It can not be presumed that when a deputy sheriff says in the return the service was made by him, that the writ was executed by his principal, or that the latter was present and cognizant of what was done, or the manner in which the service was actually made.

7. **SAME—*officer disqualified to amend return, by interest*.** The law has prohibited a sheriff from executing process in a case in which he has an interest. So where service of a summons was made by a deputy sheriff, and the return to the process was insufficient to confer jurisdiction of the person of the defendant on the court, it was *held*, his principal, having afterwards become interested as warrantor of property sold under a judgment obtained by virtue of the proceeding, his wife, having purchased from the purchaser at the execution sale, a portion of the land sold, and he joined with his wife in a warranty deed conveying the same to another, could not properly amend the return even if in possession of the requisite facts concerning the manner of the service.

8. **SAME—*jurisdiction in equity to relieve against improper amendment*.** And the sheriff, by leave of the court, after his term of office had expired, having made such improper amendment, so as to obviate the objection as to jurisdiction, and it appearing he was insolvent, a court of equity had jurisdiction, upon bill filed for that purpose, to relieve the defendant in the original proceeding from the effect of the amended return—the same under such circumstances, being fraudulently made, and operating as a cloud upon his title, and there being no adequate remedy at law.

Opinion of the Court

APPEAL from the Recorder's Court of the city of Chicago ;
the Hon. WILLIAM K. McALLISTER, Judge, presiding.

The opinion states the case.

Messrs. ROSENTHAL & PENCE, for the appellants.

Mr. GRANT GOODRICH, Messrs. BATES & HODGES, Messrs.
HOWE & RUSSELL, Messrs. RUNYON & AVERY, and Mr. J. A.
CRAIN, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court :

It appears that Charles O'Conner died on the first of March, 1858, intestate, seized of the premises in question, and leaving surviving him his widow, Ann O'Conner, and two children, appellants in this case. On the 21st of October, 1858, the widow, who was, at the time of his death, *enceinte*, was delivered of a female child who was named Ann; these three children being his only heirs at law. The widow was, on the 4th day of March, 1858, appointed administratrix of the estate of deceased, and on the 28th of the following August she filed a petition as such, in the County Court of Cook county, asking leave to sell real estate to pay debts of the estate.

Appellants and two tenants in possession were made defendants, but the posthumous child was in no manner made a party to the suit, or otherwise noticed in the proceeding. A summons was issued, directed to the sheriff to execute, returnable to the next September term of the court. On the day of its date, Samuel Miles, the deputy sheriff, served it and indorsed upon it this return: "Served this writ on the within named Mary O'Conner and Charles O'Conner, the others not found in my county, the 26th day of August, A. D. 1858.

"JOHN L. WILSON Sheriff,
"By S. MILES, Deputy."

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Mary was at that time between three and four years old, and Charles between one and two. A guardian *ad litem* was appointed for them by the court, and at the return term, and before the birth of the posthumous child, a decree was rendered ordering a sale of all the premises to pay debts of the estate. About a year after the rendition of the decree, the premises were sold by the administratrix, and a large portion of the property was purchased by Gilbert L. Wilson, a brother of the then sheriff. Gilbert L. Wilson conveyed a portion of the property to Maria E. Wilson, wife of John L. Wilson, and another portion to Caroline L. Bishop, sister of himself and John L. Wilson. John L. and his wife, by general warranty deed, conveyed her portion to defendant Botsford, and he is in possession, claiming under that deed. Mrs. Bishop is in possession, by tenants, of the portion conveyed to her, claiming to own the same. Roles, Casey and Mather, claim the portion not purchased by Gilbert Wilson.

Litigation having arisen involving the validity of the proceedings in the county court, and the return on the summons being supposed to be insufficient to confer jurisdiction of the persons of the defendants upon the county court, John L. Wilson, the then sheriff, about twelve years after the service was had, amended the return. This is the amendment: "Pursuant to the order of the court, I have amended the return to this summons by inserting after the words Charles R. O'Conner, 'by reading the same to each of them,' this 21st day of March, A. D. 1870." Miles, the deputy of Wilson, died in 1862, and on the motion for leave to amend the return, no notice was given to complainants or their guardians of the intended application to the county court for leave to amend the return. Appellants entered a motion to set aside the order giving leave to amend the return, and to quash the amended return, but it was overruled by the court. Thereupon they filed a bill to set aside the amended return as a cloud on their title, and upon the ground that it was fraudulently made. On a hearing, the bill

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was dismissed, and the record is brought to this court, by appeal, and errors assigned on the dismissal of the bill.

It is insisted that correct practice requires that where a case has been disposed of and passed from the docket, the sheriff should not be permitted to amend his return, unless the party to be affected by it shall be notified. This is the rule in all other cases of amendment of a record, and it would seem that no well founded distinction exists, or sufficient reason can be assigned why the same rule should not apply to the amendment of the officer's return. This case fully illustrates the necessity of giving parties an opportunity to be heard on such an application. Here it was supposed that the return was insufficient to give the court jurisdiction of the persons, and if so, no title to valuable property passed under the proceedings. And by an amendment of the return so as to show jurisdiction, the evidence of the rights of the parties is reversed. Before the amendment, if the return was insufficient, the title would appear to be in appellants, while, after the amendment, it would appear to be in the purchaser at the sale by the administratrix, or his grantees. In case the return fails to show such a service as gives the court jurisdiction of the person of the defendant, a subsequent amendment, that shows such jurisdiction, is vital to the rights of the parties, and is as effectual to change the evidence of title, as a conveyance, or the judgment or decree itself.

To permit such amendments, as a matter of course, without notice, and by any person who may have been in office at the time, and who may subsequently have become insolvent, and whose sureties may be in like condition, or who by lapse of time have become released, would be calculated to work great wrong and injustice. The true rule of practice, upon much and mature reflection, we think, should only permit such amendments as a matter of course, and without notice, during the term at which the cause is determined. We are, therefore, of opinion that the cases of *Turney v. Organ*, 16 Ill. 43, *Dunn v. Rodgers*, 43 Ill. 260, *Moore v.*

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Purple, 3 Gilm. 149, and *Morris v. Trustees*, 15 Ill. 266, should be modified so far as they announce a different rule.

It is next objected that the return was made by the deputy sheriff, and the amendment was made by the person who was then sheriff, and his principal. In such a case, the presumption is, that the person making the return served the writ, or did what the return states was done. We can not presume, when the deputy says the service was made by him, that the writ was executed by his principal, or that he was present and cognizant of what was done, or the manner in which service was actually made. And in this case, it is rendered almost morally certain that Wilson did not serve this writ, as he says he had Miles as a deputy for the county court, and that he served the process of that court. He further says, that he himself served but few writs during his term of office. Hence, it is not at all even probable he ever knew that such a writ was ever issued. This court has held that where a service is defective, and the officer making it is dead, it can not be aided by parol evidence that due service was in fact made. *Wilson v. Greathouse*, 1 Scam. 174. Inasmuch as the return can only be amended by the facts, it should be made by the officer who served the writ and knows the facts, or if by his principal, then by a memorandum made by the officer at the time the service was had, and which clearly and unmistakably states the facts omitted in the return.

It is a wrong that the law can not sanction, to permit records to be recklessly amended by persons who are ignorant of the facts inserted as an amendment. It would be in violation of every rule of law to place the rights of parties in such hazzard, that interest, prejudice or recklessness of irresponsible persons might thus destroy them at will. Yet, when a service has been properly made, but through accident or inattention, the proper return has not been indorsed, the furtherance of justice requires that proper amendments should be allowed.

It is next insisted that an amendment should not be allowed, after the lapse of nearly twelve years. In the case of *Thatcher v.*

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Miller, 13 Mass. 271, the court held that a return by a deputy sheriff can not be amended by him after a period of six years from the date of the return. The court there say, "More than six years have elapsed since the return was made, and the deputy sheriff now offers to insert an essential fact, the omission of which may render him liable to an action of damages. It would be unsafe to expose officers to such temptation. For an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties upon different persons, is more than can be expected of men, however strong their memories," and numerous other cases might be cited to the same effect. In the case of *Coughran v. Gutcheus*, 18 Ill. 390, on an application to amend a record four years after judgment, it was said that the motion was out of time, particularly where there is nothing to amend by in the record.

There must be a time when such motions will be considered as coming too late. In this case, it is after the lapse of nearly double the period in which actions are barred for the recovery of land under the limitation laws of 1835 and 1839, which have designated the period of seven years; and quadruple the time allowed a non-resident not served with process, to come in and have the decree opened, and be permitted to defend. While we do not undertake to fix the period within which such an application shall be made, we are prepared to hold that such an amendment can not be made after the lapse of time that intervened in this case.

Again, this amendment was improperly made, without reference to the time of the application. From all the evidence in the case, we think it not only fails to appear the sheriff had the requisite knowledge of the facts to make the amendment, but, on the contrary, it does appear that he did not have such information. He says he was not in the habit of serving process, but may have served a few writs during his continuance in office; that Miles was appointed a deputy for the county court, and served its process; that many thousand

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writs were issued and served during his term, and that he gave a general superintendence to the business of the office. And further, the return as made shows the writ to have been served by the deputy. Wilson also declines to answer whether he had any knowledge of the service, lest he might render himself liable. From these facts, who can doubt that he was entirely ignorant of this service and of the manner in which it was made? Instead of saying he knew the service was made by reading or by copy, he says he makes the amendment under the order of the court. The court had made no such order, but simply given leave to amend. That leave only implied authority, if the facts warranted it—only if the truth in reference to the service justified it. No one can suppose the court had the power to authorize an amendment by the insertion of what was untrue in fact, or if it had such power that it would authorize such injustice to be perpetrated. No officer has the legal or moral right to make a false return, or one that he does not know to be true. It seems to us that this amendment was recklessly made, when the facts disclosed wholly fail to warrant it.

Nor does it appear that there was any memorandum, which could under any circumstances authorize the amendment. The memorandum in pencil, "Served upon Charles R. and Mary O'Conner, August the 26th," does not, in the remotest degree, indicate the manner of the service, whether by copy, by reading, or in some other mode the officer may have supposed was equally valid. This memorandum discloses nothing more than was shown by the return itself. Nor can the memorandum, "208 Huron st." lend the slightest aid. It seems to be without any significance as to the return. If it referred to the supposed residence, it would not in the slightest degree aid in determining whether a copy of the summons was delivered, or it was read to the defendants. The record seems to be barren of all facts justifying the amendment.

Again, Wilson had almost a direct interest in the amendment, as, if the return was not sufficient to confer jurisdiction,

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he was liable, on his warranty, for a large sum of money, but if jurisdiction could be shown, he would escape such liability. The law has not authorized, but has prohibited, the sheriff from executing process in a case in which he has an interest. And this amendment falls as fully within the statute as if it was original service of the writ. And it is the common law rule, that an officer shall not decide his own case or execute process in his own favor. *Snydacker v. Brosse*, 51 Ill. 357. He was, for this reason, powerless to amend the return.

In the case of *Botsford v. O'Conner*, *ante*, p. 72, this court said, in reference to this return, "It may be, if the service was by reading, and the sheriff were to amend his return so as to show that fact, it might be different," from the conclusion then announced. It will be observed that this does not give leave to amend, but simply leaves the parties to apply for leave in the court below. And the parties seem to have understood that they had to apply to the court below for the purpose, as that was the course pursued. From what was there said, in the light of previous decisions of this court, the court below reasonably supposed that the amendment must be allowed, as a matter of course.

We now come to the question, whether a court of equity has jurisdiction to grant the relief sought. It abundantly appears that Wilson, who made the amendment to the return, had a direct interest in the result of the amendment. He, with his wife, had sold a considerable portion of this property, and warranted the title. If the return, as originally made, failed to confer jurisdiction, then he was liable on his warranty; but if such an amendment should be made as to obviate the objection, then he would escape that liability. We have seen that he did not profess to have the requisite information to make the amendment; and by his use of his former position as sheriff to release himself from that liability, he perpetrated a fraud on appellants that a court of equity should not sanction. He should not, while pretending to perform a duty under the law, be permitted to act alone for the promotion of his own interest

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by gaining such an advantage under color of office. Again, as a general rule, the return of an officer can not be attacked in a collateral proceeding. In this case, inasmuch as Wilson is insolvent, no available remedy can be had by suing for a false return, and we can perceive no other adequate relief but by a decree in chancery. In the case of *Owens v. Ranstead*, 22 Ill. 161, it was held that in a proper case made, equity will relieve against the effects of a false return; that the remedy by action against an officer for a false return, is not always adequate. And this case illustrates the necessity of the rule. This false and improper return, as amended, operates as a cloud on the title of appellants, be that what it may, and they have a right to have the return restored to its original condition, so as to be unembarrassed by it in asserting their title.

For these reasons, the decree of the court below is reversed and the cause remanded.

Decree reversed.

MARGARET M. DONOGHUE

v.

THE CITY OF CHICAGO.

DOWER—allowance to widow in lieu of dower under sec. 28, of dower act—whether equity has jurisdiction to change it. Where a widow has petitioned to recover dower, and by reason of the indivisibility of the property an allowance has been made to her, under the 28th section of the Chapter on Dower, in lieu of dower, the sum so fixed can not afterwards be changed by a court of equity by reason of the property subsequently becoming greatly enhanced or depreciated in value.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was a suit in chancery, brought by Margaret M. Donoghue against The City of Chicago, for a re-assignment of dower in certain premises. The defendant filed a demurrer to the bill, which was sustained by the court, and the complainant electing to abide by her bill, the same was dismissed. The complainant appeals.

Messrs. DENT & BLACK, for the appellant.

Mr. M. F. TULEY and Mr. I. N. STILES, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The question involved in this case is, whether, when a widow has petitioned to recover dower, and by reason of the indivisibility of the property, an allowance has been made to her in lieu of dower, the sum so fixed becomes conclusive and can not be changed by a court of equity, although the property may subsequently become greatly enhanced or depreciated in value.

The facts alleged in the bill and admitted by the demurrer are briefly these: On the 3d day of October, 1860, the appellant filed her petition in the Circuit Court of Cook county, for dower in certain premises, against Joseph N. Barker, and The City of Chicago, and upon the hearing she was found to be entitled to dower, and thereupon commissioners were appointed by the court to assign dower, under the statute, who, at a subsequent term of the court, reported that the premises could not be divided, nor dower assigned, without manifest injury to the rights of the parties interested therein. Upon the confirmation of the report, a jury was called and assessed the yearly value of the dower in the premises at the sum of seventy-five dollars, and the court decreed the payment of that sum, and a like sum annually, in lieu of dower, during the natural life of the dowress.

Since the rendition of the decree in the former proceeding, the property has greatly risen in value, so that the sum of seventy-five dollars per annum is now grossly inadequate as an allowance for dower therein, the premises being worth the sum of thirty thousand dollars without any improvements, and would readily rent, unimproved, for a term of years, for at least fifteen hundred dollars, and that sum is the present fair rental value.

Our statute follows the common law, and declares that "a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been released in legal form." It is also provided, that whenever it is practicable to do so, the dower shall "be set off and allotted to the widow, by metes and bounds, according to quality and quantity."

In view of the fact, that some estates could not be divided without great detriment to the rights of the parties interested, in case of a division giving to the widow a portion too small for profitable use, the legislature, to make provision whereby the widow should receive the benefit of her right, and the estate should not be rendered valueless by an unwise division, enacted the 28th section of the chapter on dower, in which it is provided, that when "the land or other estate is not susceptible of a division without great injury thereto, a jury shall be empaneled to inquire of the yearly value of the widow's dower therein, and shall assess the same accordingly; and the court shall, thereupon, render a judgment, that there be paid to such widow, as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of her dower, and the like sum on the same day in every year thereafter, during her natural life."

The policy of the common law was, doubtless, that the dower should be assigned by "metes and bounds," one-third of the estate itself. Much trouble arose out of the difficulty, in some estates, of making an equitable division of the property,

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so that the same could be enjoyed by the dowress and the heir. Obviously, to avoid the practical difficulties in the way of assigning dower by "metes and bounds" in certain estates, too limited in extent to be profitably divided, the statute above referred to was enacted. The power of the legislature to make such a provision for the maintenance of the widow, in lieu of dower, at common law, can not be questioned. Indeed, the right of dower might be abolished by legislative power, if deemed expedient, and other more beneficent provision made.

The effect of the statute is, where lands are found to be indivisible, and the yearly value of the dower is assessed in the mode prescribed, that such assessment, by force of the statute, stands in lieu of dower and the heir or the owner of the fee will take the estate discharged from dower, but instead thereof, burdened with a certain annuity during the natural life of the widow. Such is the plain meaning of the law, and if it works hardships in certain cases, only the power that enacted it can afford the remedy. It is not in the power of a court of equity to relieve against the force of a statute, the meaning of which is not doubtful.

In the case under consideration, the yearly value of the dower was fixed by the decree of the court, some ten years ago, and the aid of a court of equity is now invoked to relieve against the effect of that decree, on the ground that, since the former proceedings were had, by reason of the enhanced rental value of the premises, the yearly value of the dower as then fixed by the court is grossly inadequate.

It is not perceived how a court of equity will obtain jurisdiction to afford the relief sought. The grounds of equitable jurisdiction are, usually, fraud, accident or mistake. None of these elements are to be found in the case under consideration. It is not pretended that the decree was not fairly pronounced, or that the value of the dower was not then fairly assessed. Had the assessment been unfairly obtained, or for an inadequate amount, the widow would at that time have been permitted to contest it, and would have been entitled to have a reassessment.

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Not having done so, we will presume that the assessment was fairly obtained, and for the proper amount.

It is not doubted, that, at common law, if the sheriff was guilty of fraud in making the assignment of dower, equity would relieve either party, and order a re-admeasurement of dower. To this effect are the cases, *Hoby v. Hoby*, 1 Ver. 218, and *Sneyd v. Sneyd*, 1 Atk. 442. It is believed that no case can be found where a court of equity ordered a reassignment of dower, unless where the bill charged fraud or mistake. Relief has been granted where the title to the lands assigned to the widow or heirs has failed after assignment, and a reassignment ordered, as in the case of *Singleton's Heirs*, 5 Dana, 87.

We have not been referred to a single case that holds the contrary doctrine.

The questions involved in the case of *Gove v. Cather*, 23 Ill. 634, cited by counsel, are not analogous to the one we are considering, and the reasoning of the court will not be regarded as controlling the decision of this case.

In this instance it was found that the appellant could not have dower assigned to her by "metes and bounds," and by the decision of the court, she got all that the law provided she should have in "lieu of dower," and there being no fraud or mistake charged in the proceedings, there is no ground for equitable relief, and the decree of the circuit court is affirmed.

Decree affirmed.

MARTIN ANDREWS

v.

THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENTS in Chicago—validity of ordinance in that regard. An ordinance providing for a special assessment for certain improvements in the City of Chicago, ordered that the improvements be made, excepting

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such portions thereof as had been already made in a suitable manner, the work to be done under the superintendence of the board of public works; but neither the ordinance nor any of the proceedings in any way defined what portion of the work had been before done in a suitable manner: *Held*, the ordinance was void.

2. *SAME—certificate of publication.* A certificate of publication of the notice of making a special assessment by the board of public works in the City of Chicago, or that of the application for confirmation thereof by the common council, is fatally defective if it fails to state the date of the first and last papers containing the notice, or something equivalent thereto.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion sufficiently states the case.

Messrs. SPAFFORD, MCDADE & WILSON, for the appellant.

Mr. M. F. TULEY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a suit upon a warrant for the collection of a special assessment, for the paving of Chicago Avenue, from the east line of Clark street to the east line of block 53, Kinzie's addition. The ordinance ordered that portion of said street to be curbed with curb stones, filled, graded and paved with wooden blocks, excepting such portions of the above described work which have been already done in a suitable manner; said work to be done under the superintendence of the board of public works.

What portion had been already done in a suitable manner was in no way defined. Appellant, having made the proper objections to judgment, introduced in evidence all of the proceedings, certified by the city clerk, from which it appears that the same exception was contained in the assessment roll, the oath of the commissioners, and other proceedings; and that the certificate of publication of the notice of the time and place of

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making the assessment, as well as of notice of application to the council, for confirmation, was thus: "This certifies that the appended corporation notice has been published in the Chicago Republican, the corporation newspaper of the city of Chicago, county of Cook and State of Illinois, six days consecutively, (excepting Sundays and holidays), commencing with Wednesday, August 25th, 1869."

We have repeatedly held, at this term, that such an ordinance was void, and that such a certificate of publication of notices, which were indispensable to the validity of the proceedings, was not in compliance with the statute requiring the date of the first and last papers containing the notice, to be stated. It is unnecessary here to re-open the discussion of these questions.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

CHARLES LANSING

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

POLICE OFFICER in Chicago—falsely assuming so to be. Upon the trial of a party charged in the indictment with a violation of a section of the charter of the city of Chicago, in representing himself to be a member of the police force of said city, with a fraudulent design, it appeared the defendant was deputized by a justice of the peace to serve a *capias*, and upon arresting the party against whom the writ was issued, in answer to her demand for his authority replied, "I am a police officer": *Held*, under the circumstances, the writ being issued and executed in the city, the jury were justified in the inference that the answer was designed and understood to be a representation that he was a police officer "of the city of Chicago."

WRIT OF ERROR to the Recorder's Court of the City of Chicago; the Hon. EVERT VAN BUREN, Judge, presiding.

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Messrs. CHASE & FELKER, for the plaintiff in error.

Mr. ROBERT G. INGERSOLL, Attorney General, for the people.

MR. JUSTICE THORNTON delivered the opinion of the Court :

The plaintiff in error was indicted for the violation of a section of the charter of the city of Chicago, in representing himself to be a member of the police force of the city, with a fraudulent design.

According to the evidence, he was deputized, by a justice of the peace, to serve a *capias*; and, in company with the person at whose instance the *capias* was issued, arrested Elvira Wheelock, in a car at the North Western Depot, in the city of Chicago. She inquired what she must do, and he replied, that she must settle there, or go to the court house and settle or go to jail, and demanded six dollars and the costs. As the train was about to start she paid the money, and took a receipt. She testified positively that both before and after the payment, he said he was a police officer. The *capias* was introduced in evidence, and the following endorsement was upon it :

"Demand, \$2.00; costs \$1.15. Settled by the parties.

CHARLES LANSING."

Plaintiff in error insists, that he made no representation, as charged in the indictment; that Elvira Wheelock was impeached, and was unworthy of credit; and that no fraudulent design was disclosed by the evidence.

The position is rather frivolous, that the defendant in the indictment should not have been found guilty, because, when he said he was a police officer, he omitted to add the words, "of the city of Chicago." When we consider the act and place, in connection with the language, there can be no doubt as to the character of the representation. The writ was issued and executed in the city of Chicago; and when the authority for the arrest was demanded, the reply was, "I am a police officer." This was unquestionably designed and understood to

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be a representation, that the plaintiff in error was a police officer of the city of Chicago. The jury were fully justified in such a conclusion. It was a necessary inference from all the circumstances.

We do not think that Elvira Wheelock was materially contradicted. Her testimony is positive and affirmative, that she heard the constable say he was a police officer. The witnesses called to contradict her merely state, that he did not make such representation in their hearing. The conversation was directed to her, and as she was deeply interested, it is most reasonable that she would hear distinctly, and recollect accurately, all that was said, upon the occasion of her arrest in a public car.

There is abundant evidence of the fraudulent design. As a special constable, the plaintiff in error was authorized to collect a trifle over three dollars. He represents himself as a police officer, and demands six dollars, and threatens her with the jail, as the alternative. Here was deceit and artifice to obtain a few dollars. It was a base and unmanly purpose, to extort money from an unprotected woman.

There is no error in the instructions. It was admitted on the trial, that plaintiff in error was not, in fact, a police officer; and we think the instructions, given and modified, declare the law correctly. The refused instruction had no evidence upon which to base it, and would have misled the jury. The evidence objected to was the legitimate continuation of evidence, first elicited by plaintiff in error.

The judgment is affirmed.

Judgment affirmed.

EDWARD K. ROGERS

v.

EBENEZER HIGGINS *et al.*

1. **RES ADJUDICATA**—*what so considered.* When a complainant in chancery presents his cause of action before the court, he should bring forward and urge all the reasons which then exist for its support. After a determination of the suit, the controversy can not be reopened, to hear an additional reason, which before existed, and was within the knowledge of the party, in support of the same cause of action.

2. The principle of *res adjudicata* embraces not only what has actually been determined in a former case, but also extends to any other matter properly involved, and which might have been raised and determined in it.

3. **RESCISSION OF CONTRACTS IN EQUITY**—*mental incapacity of the parties.* Mental imbecility alone will not authorize a court of equity to set aside an executed contract, the mental weakness of the party not amounting to an incapacity to comprehend the contract, and there being no evidence of imposition or undue influence.

4. Solicitation, importunity, argument and persuasion to induce the party to enter into a contract, would not of themselves affect the validity of a deed.

5. **FALSE REPRESENTATIONS**—*matters of opinion merely.* The purchaser of a lot of ground, in negotiating for the purchase, the lot being at the time in possession of a third person who claimed title thereto, after informing the vendor that the title was still in her, under the law, represented that it was doubtful about the recovery of the lot: *Held*, such representation was a matter of opinion only—the vendee's disparagement of the property, where the vendor is not presumed to trust to the vendee, but to rely upon his own judgment.

6. **CONSIDERATION**—*adequacy thereof.* And upon the question whether the price paid was grossly inadequate, it was *held*, the adequacy of consideration should be measured, not by the value of the lot, but by its value after deducting the cost of its recovery.

7. **FRAUD**—*waiver thereof.* If a party has knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief. A party defrauded can not be allowed to deal with the subject matter of the contract, and afterwards rescind it.

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8. RESCISSION OF CONTRACT—*laches*. Where a party seeks to rescind a contract for fraud, he must ask the aid of the court in a reasonable time.

9. FALSE REPRESENTATIONS—*without injury*. A court of equity will not lend its aid to set aside a contract on the ground of fraud, unless the party seeking relief has been misled to his prejudice or injury. Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. SPAFFORD, McDAID & WILSON, for the appellant.

Messrs. HIGGINS, SWETT & QUIGG, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 21st day of May, 1845, one Ann Wight, a married woman residing in the State of New York, through her agents, Ogden & Jones, made a contract in writing for the sale and conveyance of a part of a lot in the city of Chicago, to Mrs. Elizabeth Rogers, mother of the appellant, and under whom he claims, for the sum of \$400. On the 31st day of October, 1845, Mrs. Wight and her husband, they residing in the State of New York, executed to Mrs. Rogers a conveyance for the property, in pursuance of said contract.

In the year 1860, the husband of Mrs. Wight died. On the 22d day of December, 1863, Mrs. Wight conveyed the premises to Milton O. Higgins, by a quit claim deed. After his purchase, Higgins commenced a suit in ejectment to recover possession of the property.

This was a suit in equity brought by Rogers, to enjoin the prosecution of that ejectment suit, and to set aside the deed from Mrs. Wight to Higgins, on the alleged ground of its having been obtained by fraud and undue influence, Mrs. Wight having executed to Rogers a quit claim deed of all her

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interest in the property on the 3d day of July, 1869—the bill was filed on the 13th day of July, 1869.

During the interval of time between the 10th day of September, 1845, when the revised statutes of 1845 went into effect, and the 22d day of February, 1847, there was no statute of this State which authorized a non-resident married woman to execute a deed for the conveyance of her real estate situate within the State of Illinois; so the deed of October 31, 1845, from Mrs. Wight and her husband to Mrs. Rogers, was void. *Rogers v. Higgins*, 48 Ill. 211; *Lane v. Soulard*, 15 Ill. 125.

But it is alleged in this bill, that the lot was the separate estate of Mrs. Wight, and it is claimed that in equity, she could deal with it as a *feme sole*, and dispose of it without joining her husband, and that by virtue of the contract of May 31, 1845, and the deed of October 31, 1845, an equitable estate was acquired in this property, and one branch of the appellant's case is, for the assertion of that equitable right.

But in bar of any consideration of that, the appellees set up and insist upon a former adjudication in respect to it, or the same cause of action.

On the 3d day of September, 1867, Rogers filed his bill in equity, against the appellees, to enjoin the prosecution of this same ejectment suit, on the ground of an equity in him arising out of the execution of that same contract and deed; and at its September term, 1868, a final decision of the case was made by this court, adversely to the complainant, affirming the decree dismissing the bill.

In avoidance of this, it is answered, that there was no allegation in the former bill that the lot was the separate estate of Mrs. Wight, so that under the pleadings, this question of Rogers' right to the land, because it was the separate estate of Mrs. Wight, could not have been adjudicated in the former suit. Still, the cause of action in the former bill, and in the present, in this respect, is the same, to wit, that the complainant was entitled to an equity in this property, arising out of the

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execution of the said contract and deed from Mrs. Wight to Rogers; and the present bill, so far as said contract and deed are concerned, is only insisting upon an additional ground in support of the same cause of action.

A party can not have a cause of action adjudicated upon piecemeal, in this way.

When the complainant before presented his cause of action before the court, he should have brought forward and urged all the reasons which then existed, for the support of it. The controversy can not be reopened to hear an additional reason, which before existed, and was within the knowledge of the party, in support of the same cause of action.

No one should be twice vexed for the same cause of action.

This principle of *res adjudicata*, embraces not only what actually was determined in the former case, but also extends to any other matter properly involved, and which might have been raised and determined in it. *Stockton v. Ford*, 1 Blackf. 360; *Stockton v. Ford*, 18 How. U. S. 418.

The appellant has had his day in court as respects this cause of action, an alleged equity growing out of the execution of said contract and deed. That must suffice. He can not be heard again in respect to that.

Another branch of this case is, to assert an alleged equity of Mrs. Wight in this land, obtained from her, by her deed of July 3, 1869, to the appellant, on the ground that the deed from Mrs. Wight to Higgins, was procured by fraud and undue influence. At the time Mrs. Wight made her deed to Higgins, she was 66 years of age, in feeble health, her mind somewhat impaired by age and sickness, but by no means to such an extent as to incapacitate her from entering into a binding contract. She was capable of taking care of her interests and comprehending the contract she made. A court of equity will not interfere in such a case, and set aside a contract on account of mental imbecility alone. *Miller v. Craig*, 36 Ill. 109; *Lindsey v. Lindsey*, 50 Ill. 79. There is no fraud in the case to call for the interposition of a court of equity to redress.

Mrs. Wight had made a deed of the lot, and received the pay for it; and she did not know, or claim, that she had any interest whatever in it.

Higgins informed her that the title was still in her under the law, and seems to have explained to her how it was. He told her it was doubtful about the recovery of the lot. He might have been more accurate, if the expression of doubt had been whether the lot would pay the cost of its recovery. But this was a matter of opinion only—the vendee's disparagement of the property, where the vendor is not presumed to trust to the vendee, but to rely upon his own judgment. *Fish v. Cleland*, 33 Ill. 238; 1 Story Eq. Jur. § 191. But the fact that Higgins immediately afterwards offered the property to Rogers for \$1400 or \$1500, when it seems to have been worth \$4000 or more, and that there were two subsequent decisions of a court of law against the validity of his title, indicate that the opinion so expressed by him, was not only an honest, but a well founded one.

Higgins further represented that making the deed to him would not hurt Rogers, as he was rich, and could stand it. This was immaterial as affecting any legal or equitable interest of Mrs. Wight. It was rather in the nature of a conscientious appeal; and if her moral sense was such, that it allowed her to be moved by the force of an argument like that, to commit a moral wrong towards Mr. Rogers, the blame was her own.

Of a similar character was the representation that it would not injure Rogers' adjoining property. This constitutes the sum of the testimony as to any fraud, and really amounts to nothing in that respect.

The supposed undue influence consisted of solicitation, importunity, argument and persuasion. Of themselves, they would not affect the validity of the deed.

This was a case, no doubt, of very great persistence of importunity. But if by dint of wearisome importunity, a seeming assent had been obtained to the making of the deed, coming not from freedom of the will, but yielding from an inability,

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on account of the debilitated condition of the mind and body of Mrs. Wight to make further resistance to the appliances used, as soon as Higgins left this pressure was removed; and what took place afterwards could not justly be imputed to it. After a night's reflection, thinking she had done wrong, as regarded Rogers, Mrs. Wight sent for Higgins the next morning, and requested him to give back the deed she had executed, but he talked her out of it, gave her \$100, which she declined to take, but he pressed it upon her and she accepted it, and went on further in the completion of the contract made the evening before, by acknowledging the deed. There does not appear to have been any particular stress of solicitation brought to bear at this time, further than to talk her out, as she says, of demanding the deed back. The \$100 may have lent some persuasive force to the talk of Mr. Higgins. Here was a recognition of the contract made the evening before.

The nature of the contract may be such as to justify the conclusion that a person of weak understanding has been imposed upon or overcome by artifice or undue influence: But we do not think the contract between Mrs. Wight and Higgins to be of such a character.

He found her ignorant of her title to this property; he acquainted her with it, and then she was regardless of it, as she says. He left her with \$100 in her hands, and a contract for the reconveyance of one-third of the property to her after it should be recovered at Higgins' sole expense.

Here certainly was no gross inadequacy of consideration. The adequacy of the consideration should be measured, not by the value of the lot, but by its value after deducting the cost of its recovery. In the light of subsequent events, the consideration here, would seem to have been adequate.

On the 6th day of September, 1864, after there had been two verdicts against the validity of the title of Higgins, in his ejectment suit, Mrs. Wight made an alteration of their former contract when the deed was given, by releasing Higgins from his agreement to reconvey to her one-third of the lot when

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recovered, and taking in lieu thereof \$100, under the advice or opinion of her two nephews, residing in Chicago, one of whom was a lawyer, and the other a law student, that it was for her interest so to do, and that the \$100 was better than the chance of the recovery of one-third of the lot.

Here was a most distinct act of recognition and confirmation of the contract and deed.

If a party has knowledge that he has been defrauded, and yet subsequently confirms the original contract, by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief. *Edwards v. Roberts*, 7 Smedes & Marshall's Rep. 544; *Parson v. Hughes*, 9 Paige, 591; Fonbl. Eq. 129, note (r.) A party defrauded can not be allowed to deal with the subject matter of the contract, and afterwards rescind it. *Musson v. Boret*, 1 Denio, 74.

It is a well settled rule in equity, that where a party seeks to rescind a contract for fraud, he must ask the aid of the court in a reasonable time.

After the lapse of more than five and a half years from the time of the making of the contract and deed; after the subsequent recognition and confirmation of the same; after standing by and letting Higgins carry on a costly litigation for a series of years for the recovery of the lot, until he had finally established the validity of his title to it by two decisions of this court, in a suit at law and in chancery, Mrs. Wight comes forward, and says she will rescind her contract with Mr. Higgins, and take this title, the validity of which he has established, to herself. Equity will not permit this to be done.

It is Mrs. Wight's equity, which the appellant is asserting in this case, in her place, and he occupies no better standing than she would herself.

Mrs. Wight never seems to have made any complaint that her own interest had been injuriously affected in this matter; but her only objection and cause of dissatisfaction have always appeared to have been, the moral wrong to Mr. Rogers.

Story says, the party must have been misled to his prejudice or injury ; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage. 1 Story Eq. Jur. § 203.

Mrs. Wight would doubtless, never have moved, herself, in such a proceeding as this. Her deed to Rogers seems to have been a weapon, which, as a last resort, Rogers obtained from her, with which to defend the possession of this lot in his contest with Higgins. We hold it to be an unavailing one.

The decree of the court below dismissing the bill must be affirmed.

Decree affirmed.

57 251
133 379

FRANCIS E. COREY *et al.*

v.

ABRAHAM F. CROSKEY *et al.*

MECHANIC'S LIEN. In a proceeding to establish a lien to secure payment for lumber sold by the complainants to the defendant, the evidence showed that the lumber was used in completing the building on the defendant's premises, and that it was furnished for that purpose at his request. This was regarded as sufficient to bring the case within the statute of 1861.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was a petition filed by Francis E. Corey and others, against Abraham F. Croskey and others, to establish a lien on certain premises belonging to the defendants, to secure payment for lumber sold by the complainants to the defendants. On a hearing, the petition was dismissed, and the petitioners appeal.

Messrs. WAITE & CLARKE, for the appellants.

Messrs. STORY & KING, for the appellees.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was a petition for a lien, filed to secure payment for lumber sold by the complainants to the defendants. We can see no reason why the lien should not be established. The case clearly comes within the act of 1861. It is plain, from the testimony of the defendants themselves, that the lumber was used in completing the buildings upon their premises, and it is equally clear from all the evidence that it was furnished for that purpose at the request of the defendants. This brings the case within the statute.

The decree is reversed and the cause remanded, with leave to those defendants who have prior liens to make proof thereof.

Decree reversed.

JAMES M. CUTLER

v.

ELIZABETH M. SMITH.

1. TRESPASS—*wrongful entry into the house of another—license in respect thereto.* Where in an action of trespass *vi et armis*, it was sought to recover for the alleged wrongful entry by defendant, into the plaintiff's house, an instruction asked by the defendant which directed the jury, that if they believed from the evidence, that the defendant entered the plaintiff's house by her leave and license, or by the leave or license of any inmate thereof, such entry was not a trespass, was regarded as erroneous, in asserting that any inmate of the house could give a license to enter, whereas a mere stranger or trespasser might have been an inmate of the house, and the

57	252
35a	261
57	252
160	306

Syllabus.

right to the enjoyment of home in quietness and free from intrusion does not permit its invasion on the license of a mere stranger or trespasser who may happen to be in the house.

2. Though it might be that such a license, acted on in good faith, would mitigate the damages for such an entry, yet it would not operate as a justification.

3. While there may have been no facts in the case calculated to mislead the jury, had such an instruction been given, still the defendant could not complain of the refusal to give it, the same not being legally accurate.

4. In order to constitute a license to enter the house of another, it is not necessary that express authority should be given; but if a person visit the house of another to see him on business and is allowed to enter, or does enter without force, that would be deemed a license.

5. But the defendant being sued, not only for entering the house of the plaintiff with force, but for taking others with him, an instruction directing the jury that if defendant went to plaintiff's house on business, and was allowed to enter, or did enter without force, such would be deemed a license, would be erroneous as tending to mislead the jury; for if the defendant was permitted to enter the house under an express or an implied license, that would not authorize him to take his assistants with him, and although he entered himself under a license, he might still have been guilty of a trespass, in forcing those aiding him into the house against the plaintiff's will,—the instruction relating only to his own entry.

6. A man has no authority to enter the house of another without permission, even to take his own property.

7. Even an officer armed with a writ in a civil case, representing the majesty of the State, can not break into and enter a man's house to seize property.

8. A party wishing to recover property in the house of another, has his remedy by an action, and must pursue it unless he can gain access to the domicile of such person, either by express or implied assent. The home of every person is held by the law to be sacred and it will not permit intrusion against the will of the owner.

9. **EXEMPLARY DAMAGES**—*for trespass*. The law has, for the repose of society, authorized the jury to give exemplary damages, when a trespass is wanton, wilful or malicious, or when it is accompanied with such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong and to deter others from the perpetration of such acts.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JOHN OLNEY, for the appellant.

Messrs. HIGGINS, SWETT & QUIGG, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action *vi et armis*, to realty and personal property. The first count was *quare clausum fregit*, and the second to goods and chattels. To the declaration the defendant pleaded the general issue, license of appellee, and that he entered by virtue of a chattel mortgage executed by one Alonzo Cutler, on the chattels in question. To the second plea appellant filed two replications traversing the averment of license, and averring property in himself and denying the existence of a valid chattel mortgage and the right to seize the property under the same. These issues were tried by a jury, who found a verdict of \$1000. A motion for a new trial was entered, but was overruled by the court and judgment rendered on the verdict, to reverse which this appeal is prosecuted.

It is urged that the court erred in refusing appellant's first instruction ; it is this :

"If the jury believe, from the evidence, that the defendant entered the house of plaintiff by her leave and license, or by the leave or license of any inmate thereof, such entry was not a trespass."

This instruction is wrong as it asserts that any inmate of the house could give a license to enter. A mere stranger, or trespasser, might have been an inmate of the house, and yet no one would contend that they could have given a legal license to enter. It might be that such a license, acted on in good faith, would mitigate damages for such an entry, but not, as this instruction asserts, a justification. The right to the enjoyment of home in quietness and secure from intrusion does not permit its invasion on the license of a mere stranger or

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trespasser who may happen to be in the house. While there may have been no facts in the case calculated to mislead the jury had it been given, still a party can not complain of the refusal to give an instruction which is not legally accurate.

It is next insisted that the court erred in refusing to give appellant's instruction, numbered two in the series ; it is this :

“In order to constitute a license to enter, it is not necessary that plaintiff should expressly authorize defendant to enter ; but if defendant went to plaintiff's house to see her on business, and was allowed to enter, or did enter without force, this would be deemed a license.”

This instruction, no doubt, asserts a correct abstract legal proposition, but was calculated to mislead the jury. Appellant was sued, not only for entering the house of appellee with force, but for taking others with him. If he was permitted to enter the house under an express or an implied license, that would not authorize him to take those who assisted him, into the house of appellee. The instruction only relates to appellant's entry into the house, and not to his trespass in taking his assistants therein. Even if he entered rightfully, still it was a trespass, if he, without license, had his assistants to enter. A license to him did not confer power to bring any and all persons he chose into appellee's house. Thus it is seen that he might have entered under a license and yet have been guilty of a trespass in forcing those aiding him into the house against appellee's will.

There was no error in refusing this instruction :

“Even if the jury believe, from the evidence, that defendant entered in and upon the premises of plaintiff, for the purpose of taking goods and chattels to which he was entitled, and this without any permission from plaintiff, unless they believe, from the evidence, that defendant did wanton and unnecessary damage to plaintiff's property, they should not vindictive or exemplary damages.”

We are referred to no authority which holds that a party may enter the house of another without permission, even to take his own property. And if a case could be found announcing such a doctrine, we should hesitate long before adopting it. Even an officer, armed with a writ in a civil case, representing the majesty of the State, can not break into and enter a man's house to seize property. And we are aware of no rule of law that confers upon a private individual greater powers. A party has his remedy by an action and must pursue it, unless he can gain access to the domicile of another, either by express or implied assent of the occupant. The home of every person is held by the law to be sacred and it will not permit intrusion against the will of the owner.

It is urged that the court erred in giving appellee's instruction ; it is this :

"If the jury believe, from the evidence, that a trespass in this case was committed by the defendant, or his servants by his direction, in a wanton, insulting, wilful and reckless manner, the jury are authorized to find exemplary or punitive damages, that is, such damages as will compensate the plaintiff for any wrong to her, and to punish the defendant, and to furnish an example to deter others from like practices."

This instruction states a correct and undeniable principle of law ; one that has long been recognized and enforced. It is based upon sound policy. The experience of past ages demonstrates a tendency on the part of many in every community to take the law into their own hands, and to oppress, insult and abuse others, even in pursuing their rights. And inasmuch as such conduct is not indictable, the law has, for the repose of society, authorized the jury to give exemplary damages, where a trespass is wanton, wilful or malicious, or where it is accompanied with such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong, and to deter others from the perpetration of such acts.

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We now come to consider the question of whether the damages are excessive. An attentive consideration of all the facts appearing in this record, shows that they are too large. While the jury were warranted, from the evidence, in finding appellant had committed a trespass, still, it fails to show, we think, such wanton, reckless or malicious conduct as to call for the degree of punishment inflicted by so large a verdict. We will not say, that the case does or does not call for the finding of punitive damages, as that is a question for the jury, but we fail to see that the facts warrant so large a finding.

The judgment is reversed and the cause remanded.

Judgment reversed.

JAMES S. UPTON *et al.*

v.

SAMUEL CRAIG.

57	257
125	444
57	257
89a	1423
57	257
188	1559
188	1560

1. FRAUDULENT CONVEYANCES—*as against whom they may be binding.* It has been held that, however fraudulent a deed may be as against creditors of the grantor, it still may be binding as between the parties to the instrument. This principle is in no way changed by the chattel mortgage act of this State.

2. A purchased of B, as agent of C, a threshing machine belonging to the latter, and gave his three several promissory notes, secured by a mortgage thereon, and also on two horses, for the price, being \$635, but in making the mortgage, for some purpose not explained, induced the agent to specify in the mortgage, another note payable to his principal for \$200, which note, after holding a few months, the agent, his principal never at any time having had any knowledge of the matter, re-delivered to the purchaser. Upon objection that this fact avoided the mortgage, it was *held*, that while it might possibly have had that effect if a then subsisting creditor had been prejudiced by it, or it had operated so as to delay or hinder him in the collection of his debt, and as to such might be regarded as evidence of fraud, or the mortgage fraudulent *per se* and void, yet there being no subsisting creditors of the mortgagor at the time of the execution of the mortgage, other

17—57TH ILL.

Syllabus. Opinion of the Court.

than the mortgagee, the mortgage was valid and binding, not only as between the parties, but also as to third persons or subsequent creditors.

3. **CHattel mortgage—possession—agency.** The mortgage gave to the mortgagee the right to take possession of the property on default of payment of any of the notes at maturity. A short time before the last note became due the mortgagor absconded, leaving the horses on a farm he had rented of D, whereupon the latter took the horses to his barn and went to B, the agent of the mortgagee, and told him he had the horses there for him and intended they should go to the mortgagee: *Held*, this was sufficient to constitute D the agent of B to keep the horses for him; at any rate, was sufficient to show that D was, under the circumstances, in the lawful possession of the property, and with the consent and approval of B, as agent of the mortgagee.

4. **SAME—seizure of property under attachment.** While the horses were so in the custody of D, he residing in Knox county, a subsequent creditor of the mortgagor having sued out, in Peoria county, a writ of attachment against his property and placed the same in the hands of a constable, the latter went to D's house and, in his absence, inquired of his boy whether the mortgagor left any property, and on being informed that he had, asked him if his father had any claim upon it. The boy replied in the negative. Thereupon the constable went to the barn, untied the horses and took them to Elmwood, in Peoria county, and there served the attachment upon them: *Held*, in an action of replevin by the mortgagee to recover possession of the horses, the constable in so taking possession of them could be regarded in no other light than as a trespasser, and could not be allowed to justify his act under the writ of attachment thus levied within his jurisdiction.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

Messrs. JOHNSON & HOPKINS, for the appellants.

Mr. THOMAS CRATTY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of replevin, in the Peoria Circuit Court, for a sorrel mare and one bay horse, brought by James S. Upton and company, against Samuel Craig, a constable, who justified under a writ of attachment, issued at the suit of one Tracy, against William H. Ely.

Opinion of the Court.

There was a trial by jury, and a verdict and judgment for the defendant, to reverse which plaintiffs appeal.

The only questions of importance in the case are, the validity of the chattel mortgage, under which the plaintiff claimed the property, and the legality of the levy of the writ of attachment.

The objection taken to the mortgage is, that a fictitious note was included in it.

It appears the mortgage was taken by one Coe, an agent of plaintiffs, manufacturers of threshing machines, living in the State of Michigan. Ely had purchased of Coe one of these machines, and executed three several notes for the price, being \$635, and in making the mortgage he, for some purpose not clearly explained, induced the agent to specify in the mortgage another note, payable to the plaintiffs, for \$200, and this without the knowledge of his principals, which note, after holding a few months, the agent, Coe, re-delivered to Ely, his principals never, at any time, having had any knowledge of the matter.

It is insisted, this fact avoids the mortgage. It might possibly have that effect, if a then subsisting creditor had been prejudiced by it, or it had operated so as to delay or hinder him in the collection of his debt. As to such, it might be regarded as evidence of fraud, or, under the authority of the case of *Wooley v. Frye*, 30 Ill. 158, fraudulent *per se* and void.

But in this case, there was no subsisting creditor of Ely at the time of the execution of the mortgage, other than these mortgagees, and it was held in *Ward v. Enders et al.* 29 Ill. 519, in regard to conveyances, that it was settled by a long course of decisions in this country and in Great Britain, that however fraudulent the deed may be as against creditors, it is valid and binding between the parties, and the chattel mortgage act in no way changes this principle.

The mortgage in this case gave to the mortgagees the right to take possession of the property on default of payment of any of the notes, at maturity. Ely was a resident of Mason county, a renter of land from Milton Lawrence, and on

Opinion of the Court.

Tuesday the 2d of December, 1868, a short time before the last note became due, he absconded, leaving the horses in question, informing Lawrence they were under mortgage to Upton & Co. When he said to Lawrence he was going to take them away, Lawrence forbid him, and told him he would notify the parties holding the mortgage; Lawrence went to Elmwood, in Peoria county, the residence of Coe, agent of appellants, on the next Friday, and told Coe of the fact. The horses were then on the place Ely had rented and abandoned. Lawrence sent his son there when Ely left, who brought the horses to Lawrence's stable, where they remained about one week, until Craig took them. Lawrence told Coe he had taken the horses, and had them in his barn for him, and intended they should go to the mortgagee.

There is no proof other than this going to show that Lawrence was the agent of Coe to keep these horses for him, but we think it sufficient to establish an agency of that nature. At any rate, it is sufficient to show that Lawrence was, under the circumstances, in the lawful possession of the property, and with the knowledge and approval of Coe, the agent of mortgagees.

The remaining point is, the legality of the attachment levy.

This property was in Knox county; thither Craig and Kightingier proceeded—went to Lawrence's house and asked his boy, or his wife, in Lawrence's absence, if Ely left any horses, and being told he did, Craig asked the boy if his father had any claim on them, and the boy replying in the negative, Craig and his assistant went to the barn, untied the horses and took them to Elmwood, in Peoria county, where Craig served the attachment upon them, at the suit of Tracy.

In so taking this property, the appellee can be regarded in no other light than as a trespasser, and can not be allowed to justify his act under the writ of attachment levied within his jurisdiction. It is vain to deny that Craig went into Knox county and took the horses by virtue of the fact that he had

Syllabus.

this writ of attachment—took the property without the leave of the party in whose custody it was, and transported it to Peoria, and there levied upon it. No law of which we are apprised, justifies this conduct. It was only at the last term of this court, we set aside the proceedings against a debtor who had been decoyed from Wisconsin to Chicago, in order that process might be served on him there.

The mischief which would result from a sanction given by this court to such proceedings are inconceivable; such a trespasser as this appellee is shown to have been, can not challenge the right of appellants to the possession of this property under their mortgage, and, without going into a particular examination of the instructions given or refused, we will say, in general terms, that all such as disregard the principles herein stated are wrong. On another trial, the court will frame the instructions in conformity to this opinion.

The judgment of the circuit court is reversed and the cause remanded.

Judgment reversed.

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54a 323

GEORGE KELLS *et al.*

v.

JOHN P. DAVIS.

1. *PRACTICE—opening and closing of the argument.* An affirmative plea throws the burden of proof on the defendant, and, if the sole issue be upon such a plea, under the practice in this State, he will have the right to open and close to the jury.

2. *SAME—effect of error in respect thereto.* But so slight an error in practice as that the counsel of a party entitled, under the pleadings, to open and close the argument to the jury, was denied that privilege by the court, ought not to be a ground for the reversal of a judgment rendered in a judicial proceeding in all other respects regular, and that does justice between the parties.

Opinion of the Court.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Mr. W. D. BARRY and Mr. GEORGE WILLARD, for the appellants.

Messrs. STORY & KING, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of trespass for personal injuries, brought by the appellee against the appellants, in the Circuit Court of Cook county.

The appellants filed a plea of not guilty, and also two special pleas, justifying the assault and battery, upon all of which issue was joined. Before the trial, however, the plea of "not guilty" was withdrawn, and a trial was had on the issues joined on the special pleas, which resulted in a verdict for appellee for the sum of \$160, of which amount the appellee, upon the suggestion of the court, and to prevent the granting of a new trial, remitted the sum of \$60, and thereupon the court overruled the motion for a new trial, and rendered judgment on the verdict for \$100.

The ground relied on for a reversal of the judgment, is, that the circuit court erred in allowing the counsel for the appellee to open and close the argument to the jury, and in not according that privilege to the counsel for the appellants.

The plea of not guilty having been withdrawn by leave of the court, there only remained the special pleas of justification. Under the issues thus formed, the burden of proof rested on the appellants, and, according to the practice in this State, their counsel was entitled to the opening and conclusion of the argument to the jury. In *Harvey v. Ellithorpe*, 26 Ill. 418, this was declared to be the correct practice. The reason for this rule proceeds on the ground that he who affirms a fact, is bound to prove it.

Opinion of the Court.

The appellants were allowed, by the rulings of the court, to first offer their evidence to maintain their pleas, which entitled them to give any proper rebutting evidence to that offered by the appellee. This is the substantial benefit intended to be conferred by this rule. The counsel was only denied the privilege of opening and closing the argument to the jury.

While this ruling of the court may be regarded as a departure from what is understood to be the better and correct practice, it does not appear that the merits of the case were at all prejudiced by the erroneous ruling. So slight an error in practice ought not to be a ground for the reversal of a judicial proceeding in all other respects regular, and that does justice between the parties.

We have carefully considered the entire evidence, and we do not think that the appellants had any just cause to complain of the verdict even before the remittitur was entered. Indeed, the evidence, as preserved in the record, would have supported even a higher verdict. The evidence discloses the fact, that at the time the injuries were inflicted upon the appellee, he was in such a condition that he did not fully realize what he was doing. He was perhaps very annoying, but not at all dangerous, and there was no necessity for the use of so much violence.

No substantial error appearing, the judgment of the circuit court must be affirmed.

Judgment affirmed.

Mr. JUSTICE SHELDON dissenting, as to the affirmance of the judgment.

NATHAN ALLEN *et al.*

v.

THE CITY OF CHICAGO.

SPECIAL ASSESSMENT—*certificate of publication.* The certificate of publication of the notice of making a special assessment in the city of Chicago, and of notice of application to the Common Council for the confirmation thereof, is fatally defective, if it omit to state the date of the last paper containing such notice, or language equivalent thereto.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. ROGERS & GARNETT, for the appellants.

Mr. M. F. TULEY, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court :

This was an application for judgment upon report of a warrant for a special assessment for the extension of North Leavitt street. Appellants appeared and filed objections, and introduced in evidence certified copies of all the proceedings in the matter, which are preserved in a bill of exceptions, from which it appears that the certificates of publication of the notice of making the assessment, and of notice of application to the council for confirmation, were fatally defective in not stating the date of the last paper containing such notice, or any equivalent language. As this would be fatal to the proceedings upon *certiorari*, it is also fatal to the judgment rendered against appellants' objections.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

v.

WILLIAM J. FILLMORE.

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79a 51257 265
110a 1 26

1. **EVIDENCE—declarations.** In an action against a railroad company to recover for injuries to the plaintiff, occasioned by his falling through an uncovered bridge in attempting to get on the defendants' train, the bridge being under the control of the defendants, it was *held* that declarations of the conductor of the train, made after the accident had happened, tending to show that the company had been guilty of negligence, were inadmissible as evidence. The danger of the bridge and the responsibility of the company as connected therewith, were to be determined by the jury from the evidence. The conductor was a competent witness, and whatever knowledge he had as to the condition of the bridge at the time, should have been stated by himself as a witness.

2. **NEGLIGENCE—in railroads.** The bridge at which the injury occurred was thirty or forty feet long and sixteen feet high, was in the limits of a city, and over a public street in the immediate vicinity of the railroad. It had been covered by the defendants, but was uncovered at the time of the accident, for repairs, and the plaintiff, in attempting to get upon the cars at the hour of midnight, fell through the bridge: *Held*, an instruction which told the jury "that the defendants were not bound to cover and keep covered, the bridge or track over the road or sidewalk where the injury was caused," was properly refused, and that it was the duty of the company to have the bridge covered or so protected, if uncovered for repairs, as to prevent such injuries.

3. Railroad companies, in the enjoyment of their franchises and in the performance of their duties, should have a proper regard to the safety of persons whom they invite to their depots. They should omit no act, the omission of which would endanger the limbs or lives of those who seek to ride upon their trains.

4. **NEW TRIAL—excessive damages.** In an action against a railroad company to recover for injuries occasioned by the alleged negligence of the defendants, it appeared the injuries to the plaintiff were of a serious and permanent character, rendering him a cripple for life; that he suffered great pain and anguish, and was involved in a large expenditure of money, but the evidence failed to disclose any wantonness or wilfulness on the part of the defendants: *Held*, a verdict for \$25,000 was grossly excessive.

APPEAL from the Circuit Court of McHenry county; the Hon. THEODORE D. MURPHY, Judge, presiding.

This was an action brought by Fillmore against the Chicago & Northwestern Railway Company, to recover for injuries to the plaintiff, occasioned by the alleged negligence of the defendants. The plaintiff recovered a verdict, upon which judgment was rendered. The defendants appeal.

Mr. A. M. HERRINGTON, for the appellants.

Messrs. BLANCHARD & SILVER and Messrs. JOSLYN & SLAVIN, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

On the 12th of October, 1868, appellee, in attempting to get on the train of the railway company, at its depot in Elgin, fell through an uncovered bridge, which was under the control of appellants, and was seriously injured.

As the case must be reversed, we shall not discuss the negligence of the one party or the other.

There was error in allowing the declarations of the conductor of the train, made after the accident had happened, to be introduced to the jury. He was a competent witness, and should have been called by appellee. The danger of the bridge and the responsibility of the company, as connected therewith, were to be determined by the jury, from the evidence. Whatever knowledge the conductor had, as to the condition of the bridge at the time, should have been stated by himself. His statements tended to show that the company were negligent. They were but hearsay evidence, and wholly incompetent.

The instructions given were correct. The instruction refused, and of which appellant complains, is as follows:

"The court instructs the jury, as matter of law, that the defendant was not bound to cover, and keep covered, the bridge or track over the road or sidewalk, where the injury was caused."

Opinion of the Court.

This instruction was properly refused. The bridge in question was thirty or forty feet long, and sixteen feet high. It was in the limits of a city, and over a public street in the immediate vicinity of the railroad. It had been covered by appellants, but was uncovered at the time of the accident, for repairs. Soon after the injury, it was re-covered by appellants. Appellee, in attempting to get upon the car, at the hour of midnight, fell through this bridge. It should have been covered, or so protected, if uncovered for repairs, as to prevent such injuries. Railway companies, in the enjoyment of their franchises, and the performance of their duties, should have a proper regard to the safety of persons whom they invite to their depots. They should omit no act, the omission of which would endanger the limbs or lives of those who seek to ride upon their trains.

The injury to appellee was of a serious and permanent character. He is a cripple for life. He has suffered pain and anguish, and been involved in large expenditures of money. The evidence, however, fails to disclose any wantonness or wilfulness on the part of the company; and therefore we can not appreciate the motives which induced the finding of the jury. The verdict was for \$25,000. There is no foundation in the evidence for the damages awarded. In case of death, our statute only allows \$5,000, for negligent acts, however gross.

For a similar injury, inflicted by an individual, no jury would find such a verdict. However reluctant to disturb the verdict of a jury, for such cause, we must pronounce the damages allowed as grossly excessive. We shall always hold railway companies to a full accountability for all damages, from wrongful acts; and at the same time guard them from being made victims of popular prejudice.

The judgment must be reversed and the cause remanded.

Judgment reversed.

DOUGLAS G. COOK

v.

THE CITY OF CHICAGO *et al.*

1. **EQUITY OF REDEMPTION**—*whether subject to sale on execution.* The judgment debtor's equity of redemption in land sold under execution issued against him, is not such an interest as can be taken and sold under execution, and where the land is subsequently sold under another execution, against the debtor, before the time allowed by law for him to redeem from the former sale has expired, such subsequent sale is void, and the purchaser thereat, acquires no right or title to the premises.

2. **PROCESS directed to coroner**—*presumption.* Where an execution is directed to the coroner, it will be presumed, in the absence of proof to the contrary, that the clerk properly so directed it.

3. **NOTICE of sale on execution**—*who may avail of defects therein.* Where land is sold under execution, and the notice of sale given by the officer is not in compliance with the law, but the defendant in the execution has submitted to it, a stranger to the record can not avail of such irregularity, in a collateral proceeding.

4. **OFFICER'S RETURN upon execution**—*as to description of the land sold—whether sufficient.* Where a party claimed title to land by purchase at a sale thereof under execution, upon objection that the officer's return upon the execution, and the certificate of sale and the deed were inconsistent and contradictory; that the return described the land as being in township 39, and the certificate and deed as in township 38, the officer in the first part of his return, stating that he levied on the land describing it as in township 38; that he had "caused the said property to be appraised, as appears by the return of the appraisers, herewith returned and made part of my return," the return of the appraisers as also the warrant to them to make the appraisement, describing the land as situated in township 38, the officer in his return then stating that he sold "the said premises," describing them the same as in his statement of levy with the exception of naming the township as 39, instead of 38, the certificate of purchase made at the same time describing the township as 38, it was *held*, from the whole return there could be no doubt the land sold was in township 38, and calling it 39 in one part of the return was merely a false particular of description which did not vitiate.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Opinion of the Court.

Messrs. BECKWITH, AYER & KALES, for the appellant.

Mr. M. F. TULEY, for the appellees.

MR. JUSTICE SHELDON delivered the opinion of the Court:

On the 30th September, 1869, the appellant filed in the court below a bill in chancery, for the partition of a tract of land containing eighty acres, situated in Cook county. The city of Chicago claimed an adverse title to the land, and, for the purpose of determining this controverted question of title, the city was made a party defendant to the bill, agreeably to the provisions of the statute in such case made and provided. The case was heard upon the pleadings and proofs, and a *pro forma* decree entered, dismissing the bill without prejudice. An appeal was taken by the complainant from this decree; and the only questions arising upon the appeal are those which relate to the adverse title asserted by the city of Chicago. The premises in controversy formerly belonged to one John Shrigley. Both parties claim title under him, by virtue of two different judicial sales. The sale in each case was upon an execution issued against Shrigley.

The sale under which the city claims title, is void, for the reason that the same land had been previously sold by the sheriff, upon another execution in favor of Hamilton, within twelve months of the second sale, the one under which the city claims, and before the time allowed by law for redemption had expired. The first sale was made on Hamilton's execution, July 25th, 1838. The last, under which the city claims, April 29th, 1839.

At the time of the last sale, the only interest which Shrigley then had in the land, was the right to redeem; and that was not such an interest as could be taken and sold on execution.

The last sale gave no right or title to the purchaser, and was entirely void. *Merry v. Bostwick*, 13 Ill. 398; *Watson et al. v. Reissig*, 24 Ill. 281.

But it is objected, that the appellant has not shown himself to have any interest in the land.

First. Because the execution upon which the sale was made under which he claims title, **was not** directed to nor executed by the proper officer, it having been directed to **and** executed by the coroner.

But it does not appear that it was not properly so done. Upon a certain contingency, the writ should have been directed to the coroner. Upon affidavit made and filed with the clerk, of the partiality, prejudice, consanguinity, or interest of the sheriff or his deputy, it was the duty of the clerk, under the statute, to direct the execution to the coroner. For aught that appears, such an affidavit was made and filed in this case. The affidavit did not become a part of the record, and it was not necessary that the writ should recite any reason for its being issued to the coroner. *Bastard v. Trench*, 3 Adolph. and Ellis, 451. We will presume, especially after the lapse of so long a period of time, that the clerk performed his duty and rightly directed the writ.

Second. That the notice of sale given by the coroner does not appear to have been in compliance with the law. Where the defendant has submitted to it, a stranger to the record can not avail himself of any such irregularity, in a collateral proceeding. *Swiggart v. Harber et al.* 4 Scam. 364 ; *Rigg v. Cook*, 4 Gilman. 336.

Third. That the coroner's return upon the execution, and his certificate of sale and deed are inconsistent and contradictory ; the return describing the land as being in township 39, and the certificate and deed as in township 38.

The officer, in the first part of his return, says, that he levied the execution on a number of town lots, describing them, and also on W. half N. E. qr. sec. 8, T. 38, range 14, and E. half N. W. qr. sec. 8, T. 38, range 14 ; that he had caused the said property to be appraised, "as appears by the return of the appraisers, herewith returned and made part of my return." The return of the appraisers, as also the warrant to them to make

Syllabus.

the appraisement, describe the two tracts as above as being in township 38. The officer's return then goes on, and states that he sold "the said premises," to Isaac Cook, as follows, viz: describing each town lot and each of said tracts, and the prices they brought, exactly as he had described them in his statement of levy on them, with the exception of naming the township 39 instead of 38. The certificate of purchase made at the same time, describes the township as 38.

There is no doubt, from the whole return, that the tracts of land sold, were in township 38, and that calling it 39, in one part of the return, was merely a false particular of description, which does not vitiate.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

WILLIAM LINTON *et al.*

v.

BENJAMIN F. QUIMBY.

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87a	671
57	271
196	82
197	87

1. **HOMESTEAD**—*illegal sale of under execution—whether may be set aside as to part of the premises sold.* Where it was sought to set aside a sale under execution, of four lots of ground, for the reason that, as claimed by the defendant in the execution, the same constituted his homestead, and had been sold without summoning a jury to set off the homestead, as required by the statute, it was *held*, the lots being sold separately, and the one on which his house was situated being worth more than \$1000, a decree setting aside the sale as to such lot alone was proper, and gave to the complainant all the relief to which he was entitled.

2. Though, had the lots been sold in a body, it would have been impossible to give this relief without setting aside the sale as to the other lots.

3. **COSTS IN CHANCERY**—*against whom should be adjudged.* Where a complainant in chancery filed an amendment to his bill, for the purpose of

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correcting a mistake in the sheriff's deed, under which he claimed title to the land in controversy, and the defendant filed a cross bill, the prayer of which was granted, but the court decreed to the complainant in the original bill partial relief, it was *held* erroneous to adjudge against the complainant in the cross bill the costs thereof, the same being necessary to the procurement of the relief obtained by it; and that the costs of the amendment to the original bill, although the relief sought by it was granted, should have been adjudged against the complainant therein, the error which it sought to correct not having been occasioned by the defendant, and he not resisting the correction in a way to make him chargeable with the costs.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. R. H. FORRESTER, for the appellants.

Mr. GEORGE L. PADDOCK, Messrs. GALLUP & PEABODY, and Mr. J. A. CRAIN, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

The original bill in this case was filed by Quimby to set aside, as fraudulent, a conveyance by Linton to Laver, absolute in form, of four lots situated in Chicago, and claimed by Quimby under a judgment against Linton, and an execution, sale and sheriff's deed. An amendment to the bill, also asked that the sheriff's deed be corrected in its misrecital of the date of the judgment. Linton filed a cross bill, asking that the sale and sheriff's deed be set aside, on the ground that the four lots constituted his homestead, and had been sold without summoning a jury to set it off as required by the statute. The lots were numbered 12, 13, 14 and 15, and Linton's house was on lot 13. The court found the deed to Laver to be a mortgage to secure a loan of \$3000, and interest from its date, and decreed that Quimby should hold the title to lots 12, 14, and 15, subject to the mortgage, and that the sheriff's deed be corrected. The court further decreed that the sale of lot 13 should be set aside. Linton appealed.

Opinion of the Court.

It is urged by appellant that the court erred in not setting aside the sale of all the lots, but in this respect the decree of the court was clearly right. The four lots, it is true, were in one inclosure, and although there was another house on lot 12, and a shop on lot 14, we waive the question as to whether all the lots could properly be considered a homestead, and place our decision on another ground.

It appears, by the testimony, that lot 13, on which Linton had his house, greatly exceeded \$1000 in value. He testifies himself, that it was worth \$3,500. The court, then, in setting aside the sale as to this lot, gave to Linton all the relief to which he was entitled. The decree does for him all that a jury could have done, if one had been called by the sheriff to set off his homestead. He has no equitable grounds for any further aid from the court. If the lots had been sold in a body, it would have been impossible to give this relief without setting the sale aside as to the other lots. But, as they were sold separately, complete justice can be rendered to Linton as to his homestead rights without doing a wrong to Quimby. The fact that each lot was sold separately, and that the lot on which Linton's house was situated was confessedly worth more than \$1000, makes it easy to fix the precise limit to which the court should go in administering equitable relief. The principle governing this case is recognized by the court in *Hill v. Bacon*, 43 Ills. 478.

But while the court committed no error in the substantial part of its decree, we are of opinion it has committed one in regard to the costs, which should be corrected. It decreed all the costs against Linton. It is very clear that all the costs growing out of the cross bill, should have been decreed against Quimby, since that bill was necessary in order to set aside the sale as to lot 13, and on that question the court decreed in Linton's favor.

Neither should the costs growing out of the amendment made to the bill, for the purpose of correcting the sheriff's deed, have been adjudged against Linton. The error was not
18—57TH ILL.

occasioned by him nor did he resist the correction in a way to make him chargeable with costs.

The decree must be reversed, in order that the costs may be properly adjudged.

Judgment reversed.

PARKER B. MASON

v.

THOMAS McNAMARA et al.

1. PRACTICE—*whether the exercise of discretionary power will be reviewed in an appellate court.* While, as a general rule, this court will not review the action of the lower courts in matters of discretion, still, cases may arise in which there has been such a state of facts as to call upon this court to interpose, to promote justice, by reviewing the decision of the circuit court, even in the exercise of discretionary power.

2. Notwithstanding it is a matter of discretion in the circuit court whether a default should be set aside, cases may arise in which the exercise of such discretion will be reviewed by an appellate court.

3. SAME—*in setting aside defaults.* The long and well settled practice in this State, has been liberal in setting aside defaults at the term at which they were entered, when it appears that justice will be promoted thereby. The practice has not been so rigid as to require the party moving to set the default aside, to bring himself within the strict rules which govern applications in equity for new trials at law.

4. But when it appears by the affidavit filed in support of the motion, that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default, if a reasonable excuse is shown for not having made the defense.

5. Though it has also been the practice to impose reasonable terms upon the defendant as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs, or that he comply with such other reasonable terms as may be imposed.

6. In such cases the object is that justice be done between the parties, and not permit one party to obtain and retain an unjust advantage.

7. SAME—*judgment of the circuit court refusing a motion to set aside a default, reversed in a given case.* On motion in the circuit court to set aside

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22a	414
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37a	395
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152	50
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35a	664
85a	667
57	274
94a	425
94a	426
d94a	427
57	274
e105a	247
105a	248
57	274
110a	419
57	274
210	591

Opinion of the Court.

a default, at the term at which it was entered, based on the affidavit of the defendant, it appeared that he had a good and substantial defense to the suit upon the merits, and that he immediately, on being served with the summons, employed counsel to make that defense, and on the affidavit of the attorney, in substance, that he immediately, upon being retained, made efforts to find the declaration and continued his efforts for the purpose till the default was entered, repeatedly examining and inquiring in the proper office and of the proper person for the papers, being unable to procure them, and that he would have made a defense, had he been able to find the declaration in time,—it being also manifest, from the affidavits, if they were true, that the papers were wrongfully, if not surreptitiously taken from their proper place of deposit, and under such circumstances as induced the belief that it was done for the purpose of preventing a defense and of obtaining the default: *Held*, the case thus presented was such as entitled the defendant to have the default set aside, and as called upon this court to reverse the judgment overruling the motion.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Chief Justice, presiding.

Mr. EDWARD ROBY, for the appellant.

Messrs. WARD & STANFORD, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellees to the October Term, 1869, of the Superior Court of Chicago, against appellant. A summons was issued, but was not served ten days before the first day of the term. The case went over, and appellees did not file their declaration until the 22d day of October. At the November term, which commenced on the first Monday of that month, a default for want of a plea was entered, the damages assessed and final judgment rendered. During the term, appellant entered a motion to set aside the default, to quash the execution issued therein, and to be let in to plead, but the motion was overruled and an appeal was prayed and perfected, and the record is brought to this court and errors assigned.

Opinion of the Court.

It appears from the bill of exceptions, that the motion was based upon affidavits filed. Roby, the attorney for appellant, swore in his affidavit that he was attorney for appellant; that he was retained, on the 27th or 28th of September, 1869, and that he, on the 30th of September, examined the papers in the suit, and only found in the wrapper the præcipe; and again, on the 22d day of October, but found no declaration; that he again examined them on the 26th of October, 1869, but was unable to find a declaration; that he inquired of the clerk having charge of the papers for them, who replied that if they were not in the wrapper he need inquire nowhere else, as they were there unless they had been stolen or mislaid. Affiant is clear and distinct in his statement that this search and inquiry were made on the 26th of October.

He also states, that on the 4th day of November, he was informed that a default had been entered in the case, and he then went to the court room and looked in the place where the papers were kept, but failed to find them, and the clerk then made diligent search, but was unable to find them and said some person had them, but he could not tell where they were. The clerk also then informed him that no default had been taken, after examining the docket. He further states that he looked for the papers on two different days after the 4th of November, and before the default was entered on the 13th of that month, but was unable to find them.

He further states that on the 16th of November, he saw in a newspaper a notice of the default, and went immediately to the clerk's office, and he then saw the papers in the suit; that the wrapper was soiled, blackened and worn at that time, while it was new and clean when he saw it on the 26th day of October. He states, as his opinion, that the papers were, when he searched for them, in the possession of plaintiff, his attorneys or his agents; that he would have made a defense had he been able to find the declaration in time.

Appellant, in his affidavit, states that he was served with the summons on the 27th day of September, 1869, and on that or

Opinion of the Court.

the next day retained Roby to defend the suit; and that he has a good and substantial defense to the action.

Appellees insist that it was discretionary in the court below to set aside the default, and, having refused to do so, this court should not review the decision. As a general rule, this court will not review the action of the lower courts in matters of discretion. But cases may arise in which there has been such a state of facts as to call upon this court to interpose, to promote justice, by reviewing the decision of the circuit court even in the exercise of discretionary power. It was held, in the case of *Scales v. Labar*, 51 Ill. 233, that notwithstanding it was a matter of discretion in the circuit court whether a default should be set aside, still, cases might arise where the discretion would be reviewed by an appellate court. As we understand the long and well settled practice in this State, it has always been liberal in setting aside defaults at the term at which they were entered, where it appears that justice will be promoted thereby. Nor has the practice, so far as our knowledge extends, been so rigid as to require the party moving to set the default aside, to bring himself within the strict rules which govern applications in equity for new trials at law. But where it appears by affidavit, that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default, if a reasonable excuse is shown for not having made the defense. It has also been the practice to impose reasonable terms upon the defendant as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs or that he comply with such other reasonable terms as may be imposed. In such cases the object is that justice be done between the parties, and not to permit one party to obtain and retain an unjust advantage.

When tested by these rules, should the court below have set aside the default? Appellant swears, and for the purposes of the motion the affidavit must be taken as true, that he has a good and substantial defense to the suit, and that he,

Opinion of the Court.

immediately on being served with the summons, employed counsel to make that defense. The attorney swears, that he, immediately upon being retained, made efforts to find the declaration, and continued his efforts for the purpose till the default was entered. He repeatedly examined and inquired in the proper office and of the proper person for the papers, but was unable to procure them. We fail to see from this record, that appellant or his attorney has omitted any duty or failed in diligence, in his efforts to present the defense. A defendant has the legal right to see the declaration filed against him before he can be required to plead, but in this case every reasonable effort to do so proved unavailing, and if appellant has, as he swears, a meritorious defense, he should, under the circumstances disclosed, be permitted to make it.

Shall appellant be condemned to pay a large sum of money because of the carelessness of the clerk, or if the outrageous misconduct of appellee has prevented him from submitting a meritorious defense to the court? The law does not design that such results shall be produced. It is manifest, if the affidavits are true, that the papers were wrongfully, if not surreptitiously, taken from their proper place of deposit, and under such circumstances as induce the belief that it was done for the purpose of preventing a defense, and of obtaining the default. We must say that we regard it as incredible, that any licensed attorney, practicing in our courts, could be guilty of such a violation of the duty of an attorney, to say nothing of the immorality and injustice of such an act, or would be guilty of countenancing or sanctioning it in others. If guilty of such conduct he would forfeit the right to be retained on the roll of attorneys.

If the papers were abstracted and retained by appellees, or their agents, with their sanction or procurement, instead of their reaping any advantage from such reprehensible conduct, they should be severely punished by the court. And if it was intentionally done by the clerk or any of his employees, they should be taught that they can not be permitted to aid and

Syllabus.

assist in the obstruction of justice, by such unwarrantable practices. The parties and officers of courts must be held to a fair, faithful and impartial observance of their duties, and they must know that such efforts to obtain advantages can not be rendered availing in our courts of justice. We are of opinion that appellant made such a case in the court below as to entitle him to have the default set aside, and as calls upon us to reverse the judgment overruling the motion.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ALLEN S. LATHROP

v.

FREDERICK HAYES.

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39a 615

1. JUSTICES OF THE PEACE—*consolidating causes of action—suit subsequently brought by defendant—construction of act of 1845.* Under section 35, chapter 59, Revised Statutes of 1845, where a party commences his action before a Justice of the Peace, the adverse party, if he have any demands existing at the time of the commencement of the suit, must bring forward the same to be litigated in that particular suit, if the same are of such a character that they can be consolidated, and which do not exceed \$100 when consolidated into one defense, and failing to do so, and the suit proceeds to final judgment, he is forever debarred from the privilege of suing for any such debt or demand.

2. So where a party commenced an action before a justice of the peace, against another, and as soon as service of process was had, the defendant commenced an action against the plaintiff, before another justice, the claims of both parties being under \$100, and of such a nature that they could have been legally consolidated in one action and defense, and the suit first commenced having progressed to final judgment, and the defendant therein failed to set off his claim as the law required him to do, it was *held*, he could not maintain his action subsequently commenced in respect thereto, although he obtained judgment therein, by default, before the justice, an appeal being taken therefrom to the circuit court, prior to the rendition of the judgment in the suit previously commenced against him.

Syllabus. Statement of the case.

8. The statute, however, does not apply to actions commenced under the attachment laws of this State. For in such actions the defendant may have no actual, but only constructive, notice of the pendency of the suit, and therefore could have no opportunity to bring forward his demands, and ought not to be debarred of his right of action without a day in court.

APPEAL from the Circuit Court of Bureau county; the Hon. EDWIN S. LELAND, Judge, presiding.

This was an action brought by Hayes against Lathrop, before one Eastlick, a justice of the peace, on a verbal contract claimed to have been made between the parties. The summons was issued by the justice on the 5th day of January, 1867, was returnable on the 11th day of that month, and was duly served on the 7th of the same month. A judgment by default was rendered against Lathrop for \$99.50, from which judgment he appealed to the circuit court. A trial in the circuit court resulted in a judgment for the plaintiff of \$50, from which the defendant appeals to this court.

It appears from the evidence that on the 3d day of January, 1867, Lathrop, the appellant herein, brought a suit against Hayes, the appellee, before Manrose, a justice of the peace, on an account owing from Hayes. The summons was served on the 5th, and was returnable on the 12th of the same month. On the return day of the summons both parties appeared, and upon trial, judgment was rendered against Hayes, from which no appeal was taken.

On the trial in the circuit court a complete transcript of the proceedings before Manrose, in the case of Lathrop against Hayes, was introduced in evidence without objection, and the appellant contends that the judgment in that case, the claims of the respective parties being under \$100, and of such a nature that they could have been legally consolidated into one action and defense, constitutes under the statute a complete bar to the present action.

Opinion of the Court.

Messrs. FARWELL & HERRON, for the appellant.

Messrs. STIPP & GIBBON, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

The question involved in this case depends on the construction that shall be given to section 35, chapter 59 of the R. S. 1845, which declares that "in all suits which shall be commenced before a justice of the peace, each party shall bring forward all his or her demands against the other party existing at the time of the commencement of the suit, which are of such a nature as to be consolidated, and which do not exceed \$100 when consolidated into one action or defense, and on refusing or neglecting to do the same, shall forever be debarred from the privilege of suing for any such debt or demand."

The fair construction of this statute is, that where a party commences his action before a justice of the peace, the adverse party, if he shall have any demands existing at the time of the commencement of the suit, shall bring forward the same to be litigated in that particular suit, if the same are of such a character that they can be consolidated into one defense, or else he shall forever be debarred. Indeed, we do not see how it will bear any other construction without utterly disregarding the plain meaning of the words used. Doubtless it was the intention of the legislature to prevent the multiplicity of unimportant suits in which only small sums of money would be involved. If the party who commences the first action can not compel the other to submit to the jurisdiction of the justice selected to try the cause, then the intention of the legislature would be totally defeated, and the law would become a dead letter on our statutes. Such a construction would permit a party, so soon as an action was commenced against him, and process served, to turn round and commence another action before another justice against his adversary,

and there would be two suits pending at the same time, when the law contemplates that there should be but one. The true meaning of the statute is that both parties shall submit to the jurisdiction of the justice who first obtains jurisdiction, and if the action proceeds to final judgment, both parties will be concluded thereby.

In *McKinney v. Finch*, 1 Scam. 152, in construing this statute, the court say, "the objects the legislature doubtless had in view were to prevent the multiplicity of suits where the matters in dispute were small, and to avoid the unnecessary accumulation of costs. These objects are effected by deciding that where a suit is commenced before a justice, in which all the demands of the parties may be investigated consistently with the rules of law, and such suit terminates in a judgment binding on both parties, if the parties do not bring forward all their demands which might have been consolidated in one action, or defense, then such demands thus neglected to be exhibited shall not be the foundation of a future action." See also *Carson v. Clark*, 1 Scam. 113.

In *Douglass v. Hoag*, 1 Johns. 284, the court, in construing a statute almost identical with that of ours, say, that "to permit a defendant against whom a suit is brought, immediately to commence a cross action, and endeavor to have his cause brought to trial first, and compel the plaintiff in the first action to set off his demand in the second, would not only be throwing on him the costs of his own suit which he had a legal right to commence, but would be opening the door to that kind of strife and vexatious practice which ought not to be countenanced." See also *Sargent v. Holmes*, 3 Johns. 428.

In this instance the appellant first commenced his action against the appellee, and as soon as service of process was had, the appellee commenced the present action before another justice. This he had no legal right to do. The claims of both parties were under \$100, and were of such a nature that they could have been legally consolidated in one action and defense. The appellee having failed to set off his claim as the law

Syllabus.

required him to do, in the action commenced by the appellant, and that suit having progressed to final judgment, his right of action is now forever debarred.

It is perhaps proper to say that this statute has no application to actions commenced under the attachment laws of this State. The reason for the distinction is this: In such actions the defendant may have no actual, but only constructive, notice of the pendency of the suit, and therefore could have no opportunity to bring forward his demands, and he ought not to be debarred of his right of action without a day in court. The statute was only intended to apply to ordinary actions commenced before justices of the peace.

We are of opinion that the judgment is contrary to the law and the evidence, and must be reversed, and the cause remanded.

Judgment reversed.

ASHER CARTER

v.

THE CITY OF CHICAGO *et al.*

1. CITIES—HIGHWAYS—*power of a city to abolish sidewalks upon a street.* The owner of a tract of land, laid the same out into blocks and lots, as an addition to the city of Chicago, dedicating a strip of ground in front of the lots to the public, for the purposes of a street, reserving, however, a space between the lots and the street so dedicated, for the purposes of court yards only: *Held*, the city authorities had no power to appropriate such portion of the space so dedicated as a street, to the purpose of a roadway merely, as would deprive the owners of lots on one side of the street and fronting thereon, of a sidewalk between the court yards thus reserved and the roadway proper.

2. CHANCERY—*jurisdiction to enjoin a city from an abuse of power in respect to the use of its streets.* Where the authorities of a city undertake, by ordinance, from fraudulent and malicious motives, to appropriate so much of one side of a street to the purposes of a roadway, as will deprive

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148 6257 283
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186 289857 283
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Syllabus. Opinion of the Court.

the adjacent property owners of any sidewalk, a court of chancery has jurisdiction to interpose by injunction, at the instance of the property owners, to restrain the city from the execution of such an ordinance.

8. A city holds the fee of its streets in trust for the benefit of all the corporators, and in case of a violation of such trust by an excess or abuse of power, and in bad faith, by public officers, as in such a case, which would result in an injury to the rights and property of an individual, the court has jurisdiction, and will not inquire whether the injury will be irreparable.*

WRIT OF ERROR to the Superior Court of Chicago.

Mr. EDWARD S. ISHAM, for the plaintiff in error.

Mr. I. N. STILES and Mr. M. F. TULEY, for the defendants in error.

Mr. JUSTICE McALLISTER delivered the opinion of the Court :

This is a writ of error to the Superior Court of Chicago. The record shows, that plaintiff in error exhibited his bill in behalf of himself and all others similarly situated, on the chancery side of that court, to enjoin the city of Chicago, and the members of the Board of Public Works, from carrying into effect a certain ordinance, and from doing certain proposed and threatened acts with reference to a portion of Franklin street, in said city. Defendants filed a general demurrer to the bill, which the court sustained. The question, therefore, is, whether upon the face of that bill the plaintiff was entitled to the relief sought.

The substantial elements of the case presented by the bill are, that the original proprietors of a fractional part of the N. E. qr. of sec. 9, town 39, in which the west part of Franklin street is located, laid the same out into blocks, lots, streets and alleys, making a map thereof, pursuant to statute, and recording it as Butler, Wright & Webster's addition to Chicago. Among the streets so dedicated to public use, was the west side

*See also *City of Peoria v. Johnston*, 56 Ill. 45.

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of Franklin street, as the same extends from Kinzie street to Chicago avenue ; that by said map, there was a space between the west line of Franklin street and the east end of the lots adjoining, twelve feet wide. The proprietors, after describing this space to which the fee was reserved to themselves, declare upon the map as follows: "The said reserved twelve feet being hereby reserved, in front of each lot fronting on Franklin street, for the purpose of court yards only. Such court yards may be fenced in and ornamented with trees, &c., but never to be built upon."

That plaintiff derived his title to his premises from Wright, one of said proprietors ; the deed describes them with reference to this map, and are situated upon the southwest corner of Franklin and Erie streets, extending along the west side of Franklin one hundred feet. That himself, as well as other owners of lots upon the same side of the street, had enclosed the court yards in front, and appropriated them according to the terms and purposes of the said reservation. That the width of Franklin street and to which the city has the fee, and the right to use it, for roadway and sidewalks, is fifty-six feet and no more, and which is exclusive of the court yards.

The bill alleges, that the dedication of the site of Franklin street, as such, was for the use and benefit of the lot owners thereon ; that through a wanton, unnecessary and oppressive abuse of power on the part of the city, and in pursuance of a fraudulent and oppressive scheme and design on the part of the city and the Board of Public Works, to get possession and to deprive plaintiff and others owning property along said west side of Franklin street, of the said space of twelve feet, reserved for their use and benefit as aforesaid, and to compel them to relinquish to the city, without compensation, their right to and beneficial interest in said ground so reserved, and donate the same for use as sidewalks, or be deprived of any sidewalk along their property, and to subject them to annoyance and inconvenience. Their sidewalks upon that side of the street have been directed to be converted into a roadway, by an ordinance

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of the common council, passed August 19, 1869, whereby it was ordered that the width of the roadway of North Franklin street, from Kinzie street to Chicago avenue, be and the same thereby was established at forty feet, making the east line thereof parallel with and fourteen feet west of the east line of said street, and repealing all other ordinances in conflict therewith.

It is alleged that the Board of Public Works, in pursuance of a fraudulent and oppressive scheme and design as aforesaid, are proceeding, under said ordinance, to construct curb walls along said Franklin street, in front of plaintiff's premises, and to establish a roadway forty feet wide, making the east line thereof fourteen feet west of the east line of said street, and are establishing the west line of said roadway at a distance of fifty-four feet west of the east line of said street, and that no space will be left for a sidewalk upon the west side of the street, while the width of fourteen feet is to be left for one on the east side of the street.

The facts alleged in this bill, of themselves, without any specific allegation of fraudulent design, wantonness or oppression, show as clear a case of gross abuse of power and oppression, as could well be described upon paper.

In cities the sidewalks are considered a part of the public streets, and as such, are to be kept, like the streets themselves, in a safe and convenient state of repair through their entire width.

The acts begun and threatened, and whose consummation this bill seeks to prevent, are both the destruction and permanent deprivation, by the Board of Public Works, and other city authorities, of a sidewalk upon the west side of Franklin street; while one of unusual width is given upon the east side, and this through mere wantonness, oppressive abuse of power, breach of trust, and a fraudulent scheme and design on the part of the city and Board of Public Works, to injure, annoy and oppress the plaintiff and other property owners favored with these court yards. And what seems strange is, that at

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this age of equity jurisprudence, there should be doubt as to the jurisdiction of a court of equity to grant relief; yet that is the only question really involved in this case. An ordinance which effectually deprives the property owners upon this street, of all use of a sidewalk, for the distance of half a mile, as the bill alleges, is beyond the limits of the power of the council, and is unjust, unequal and oppressive. Sidewalks in a populous commercial city like Chicago, are indispensable to the safety and convenience of these lot owners and the public. A thoroughfare without them, and all roadway, would be dangerous to life and limb. So that, if the Board of Public Works should wilfully convert a public street into one broad roadway, without sidewalks, it would not only be a violation of a public trust, but the members would be as much subject to indictment for creating a public nuisance as if they had made the use of the street dangerous to life and limb by the construction of pit falls in the street or sidewalk. What would be thought of the civilization of that city, if all its great thoroughfares were mere roadways without sidewalks, and blear-sighted age, decrepitude and thoughtless childhood were alike exposed to the ever-imminent dangers of crowded and reckless travel upon them?

The city holds the fee of the streets in trust, for the benefit of all the corporators. The plaintiff and the other lot owners purchased their lots, with reference to the dedication of Franklin street to the public, for the ordinary purposes of a street.

It is an abuse of authority to so deprive these parties of a sidewalk, as to compel them to appropriate their court yards for that purpose, even if the lot owners could do so. But they can not. The fee in that space was reserved to the original proprietors, who made a qualified dedication of the ground for a particular use, viz: "court yards only."

Neither can the city so appropriate them without proceeding to condemn according to law, and make compensation. No such proceeding is contemplated by the ordinance set out in the bill.

If the scheme charged to exist were consummated, the plaintiff would be without any adequate remedy at law. He might maintain an action for a specific injury to person or property, but would be still subject to the dangers and inconvenience to himself and family, if he have one, of a street without a sidewalk, which would constitute a public nuisance to his irreparable injury. But if there has been a violation of a trust, by an excess or abuse of power and in bad faith, by public officers, as in this case, which would result in an injury to the rights and property of an individual, the court has jurisdiction, and will not inquire whether the injury will be irreparable.

The question for decision, is not whether a court of equity will interfere with the exercise within its proper limits, of a public political power vested in the city, which necessarily involves the largest discretion; but whether in the case of a plain departure from the power which the law has vested in it, and from fraudulent and malicious motives, it is, by the use of property which it holds in trust for the benefit of the public, about to do an irreparable injury to the property of individuals, a court of equity will intervene to prevent such injury. In the case of *Frewin v. Lewis*, 4 Mylne & C. 249, which was a suit against the poor law commissioners, who are a *quasi* public corporation, Lord COTTENHAM, in giving his opinion said: "So long as these functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct, is good or bad, but if they are departing from that power which the law has vested in them—if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority."

In the case of *Attorney General v. The Mayor of Liverpool*, 1 M. & C. 171, the Master of the Rolls says: "If property

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is held by a corporation as a trustee, if the corporation holds it clothed with public duties, the court has always asserted its right to interfere."

In *Smith v. Bangs et al.* 15 Ill. 400, this court said: "So a court of equity has jurisdiction to interpose by injunction, where public officers, under claim of right, are proceeding illegally to impair the rights or injure the property of individuals or corporations, or where it is necessary to prevent multiplicity of suits."

Authorities might be multiplied indefinitely; but it is unnecessary. We are satisfied the court below had jurisdiction, and that the bill set out a case entitling the plaintiff to relief.

The decree of the court below, sustaining the demurrer and dismissing the bill, must be reversed and the cause remanded.

Decree reversed.

TALMADGE E. SPAIDS

v.

OLIVER W. BARRETT *et al.*

1. *SLANDER—privileged statements in legal proceedings.* Whatever is said or written in a legal proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it. So in an action on the case for wrongfully suing out an attachment, a count in the declaration which was merely a count in slander, based upon an alleged libellous affidavit filed for the procurement of the writ, was *held* bad on demurrer.

2. *DURESS of property—whether will avoid a contract.* Where goods, requiring special care, and of a perishable nature, were wrongfully taken and kept from the owner thereof by means of a writ of attachment fraudulently obtained, and were rapidly going to destruction, and the party in possession refused to surrender the goods on payment of the sum actually due, demanding more than twice that amount, and, in addition thereto, a release from all damages for his wrongful acts, and the defendant in the attachment, to obtain possession of his property, paid the sum demanded

19—57TH ILL.

57 289
26a 504

57 289
46a 318

57 289
56a 431

57 289
67a 296

57 289
169 483

57 289
73a 182

57 289
94a 175

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and executed the release, it was *held*, in an action on the case for wrongfully suing out the attachment, a release executed under such circumstances could be avoided on the ground of duress.

3. ACTION ON THE CASE—for maliciously suing out a writ of attachment.* An action on the case will lie for maliciously suing out an attachment and seizing the goods of the debtor, even though there was at the time some indebtedness. The party injured in such case is not restricted to a suit on the attachment bond.

4. SAME—of the averments in the declaration—whether sufficient. In an action on the case for wrongfully suing out an attachment against the goods of the plaintiff, the declaration averred that the money claimed in the attachment was paid to save the property from total ruin: *Held*, the payment of the money having released the property from the levy and ended the suit, this was equivalent to an averment of a termination of the proceeding in attachment. The omission of such an averment is however cured by verdict.

5. While the averment of the want of probable cause is of the *gist* of such action, still the words "without any reasonable or probable cause" are not indispensable. Language may be used having the same meaning, and if this necessary averment of the want of probable cause is included in the sense of the declaration, that is sufficient.

6. Where the declaration averred, substantially, that the defendants, wickedly and maliciously intending to injure and ruin the plaintiff, and extort money from him, procured the making of an affidavit and the issuance of a writ of attachment, and that they knew the statements in the affidavit were false, it was *held*, upon the question as to the sufficiency of the declaration, on motion in arrest of judgment, such averments negatived the existence of probable cause, and were equivalent to the positive assertion of a want of probable cause.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. SLEEPER & WHITON, for the appellant.

Mr. HENRY S. MONROE, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The question presented in this case, as to the sufficiency of the declaration, will be considered as on motion in arrest of judgment.

*See also the case of *Lawrence v. Hagerman*, 56 Ill. 68.

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The demurrer was properly sustained to the second count. It is nothing more than a count in slander, based upon an alleged libellous affidavit, filed in a legal proceeding. Whatever is said or written in such proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it. 1 Hill. Torts, 344; *Warner v. Paine*, 2 Sandf. 195; *Garr v. Selden*, 4 Comst. 91.

The first count alleges that the plaintiff was a dealer in oysters, and doing a large and lucrative business, and was indebted to appellees for transportation, &c., in the sum of \$1,000, which he was able and willing to pay, and that they, maliciously intending to injure him and deprive him of his business, procured Barrett, one of appellees, to make an affidavit, and that he did make an affidavit that plaintiff was indebted to the express company in the sum of \$2,996.30, for transportation, &c., and that he had fraudulently conveyed and assigned his property, and was about fraudulently to conceal, assign, or otherwise dispose of his property, so as to hinder and delay his creditors; and that appellees then filed said affidavit with the clerk of the circuit court of Cook county, and obtained a writ of attachment, and procured the levy thereof upon \$5,000 worth of oysters, and deprived the plaintiff of possession, and neglected to take care of them; by reason whereof they became of no value.

The declaration further alleges that it was not true that the plaintiff had fraudulently conveyed or assigned, or intended to conceal and assign, his property, so as to hinder and delay his creditors; that he was not indebted in the amount mentioned in the affidavit, and that the same was false and fraudulent, and well known to be so, by appellees; and that they, wickedly and maliciously intending to injure, and extort a large sum of money from him—nearly \$2,000 more than was due upon a fair accounting—refused to permit the oysters to be delivered to him, except on the payment of the sum in the affidavit mentioned; and that he, under protest, and to save his property from utter ruin, paid the same, not knowing that

the oysters had sustained serious injury, by reason of the carelessness of appellees.

To this count, the general issue and a special plea of release were filed.

To the special plea the plaintiff replied *non est factum*, and that the release was obtained by duress of property. A demurrer was interposed to the special replication, which was sustained, and the plaintiff abided.

Three questions are raised by the record, and in the argument. First, is the special replication a good defence? Second, is not the plaintiff restricted to his remedy on the attachment bond? Third, is the count bad, on motion in arrest, for omitting to aver the termination of the suit, and the want of probable cause?

Upon the first question the authorities differ. All promises made and contracts entered into, where there is duress of the person, may be avoided. The reason is, that the person is induced to do the act by restraint of his liberty, or menace of bodily harm. But it has been held that an agreement, made under duress of goods, is not void, and that the person thus circumstanced must exert himself and resist the compulsory influence, when his property is in danger. We can not appreciate the difference. Liberty and life are justly dear to all men, and so is the exclusive right to possess, dispose of, and protect from destruction, our property. We can not forget the fact that the desire for property is a strong and predominant characteristic of man, in organized society. An act done, prompted by this desire to preserve, and impelled by fear of the destruction of goods, is not voluntary. It is an act of compulsion. In *Fashay v. Ferguson*, 5 Hill, 158, Bronson, J. said: "I entertain no doubt that a contract procured by threats, or the destruction of property, may be avoided on the ground of duress. It wants the voluntary assent of the party to be bound by it. Why should the wrong-doer derive advantage from his tortious act?"

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Consent is of the essence of all contracts. Without it there may be the shadow, but not the substance. Money paid, as the only means to recover the possession of property to which the party is entitled; or, money paid to obtain possession of goods, where wrongfully taken, may be recovered back. *Steph. Nisi Prius*, 1, 358; *Chase v. Dwinal*, 7 Greenl. 134; *Oates v. Hudson*, 6 Exch. 346; *Nelson v. Suddarth*, 1 Hen. & Munf. 350. If money could be recovered back, under the circumstances, why is not the release void? It was not obtained with the consent intended by the law. Property, which required especial care, had been, by fraud, perjury and extortion, wrongfully taken; was of a perishable nature, and rapidly going to destruction. The party having possession refused to surrender on payment of the actual indebtedness, but demands more than double the sum due, and in addition thereto a release for all damages for the wrongful acts—for the malicious violation of right and law. It would be a scandal to a court of justice if a release, given under such circumstances, could not be avoided. We think the special replication a good answer to the plea, and that the demurrer should have been overruled. *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *Sasportas v. Jennings*, 1 Bay, S. C. 470; *Collins v. Westberry*, 2 Bay, 211; *Bane v. Detrick*, 52 Ill. 19.

We entertain no doubt that an action on the case lies for maliciously suing out an attachment and seizing the goods of the debtor, even though there was at the time some indebtedness; when the indebtedness claimed exceeded the actual amount \$2,000, the levy was grossly excessive, and the object was extortion and oppression, attempted to be sustained by fraud and perjury. The party injured is not restricted to a suit on the bond. In many cases the amount of the bond would not be sufficient to compensate for the wrong—the loss of property, the destruction of business and deprivation of profits, and the injury to feelings and reputation. In case exemplary and vindictive damages were given, the bond would be no security. It is claimed that the attachment bond is similar to an injunction bond, and that the case of *Gorton v.*

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Brown, 27 Ill. 489, is in point. This court did decide, in that case, that an action could not be maintained for maliciously suing out a writ of injunction, because the injunction bond was intended to indemnify the party for all damages, in case the injunction is dissolved. This court has restricted the damages, in such case, to the judgment enjoined, and costs, and such damages as may be awarded by the court, upon the dissolution of the injunction. *Roberts v. Fahs*, 36 Ill. 271. This, too, is the language of the statute. The condition in the attachment bond is entirely different. It provides for the payment of such damages as shall be awarded, "in any suit or suits which may hereafter be brought for wrongfully suing out the attachment." This evidently contemplates suits, in addition to a suit on the bond, for on that there could be but one suit. In the case in 27 Ill. (*supra*), the court assigned, as one reason for its opinion, that only one authority could be found in the books to sustain such a suit for suing out a writ of injunction. For the action in this case there are numerous authorities: *Savage v. Brewer*, 16 Pick. 456; *Bump v. Betts*, 19 Wen. 421; *Donnel v. Jones*, 13 Ala. 490; *Ibid.* 17 Ala. 689; *Lindsay v. Larned*, 17 Mass. 190; *Whipple v. Fuller*, 11 Conn. 582; *Tomlinson & Sperry v. Warner*, 9 Ohio, 103; *Weaver v. Page*, 6 California, 681.

We have decided that the attachment suit was not terminated by consent, and that the release was obtained by duress of property. The averment in the declaration is, that the money claimed in the writ of attachment was paid to save the property from total ruin. The payment of the money released the property from the levy, and ended the suit. This is equivalent to an averment of a termination of the proceedings in attachment. The omission of such averment is, however, cured by verdict. 1 Chit. Plead. 679; 3 Steph. *Nisi Prius*, 2279; *Skinner v. Gunton*, 1 Saund. 228; *Young v. Gregorie*, 3 Call, 391; *Wine v. Ware*, 1 Siderfin, 15.

The current of authorities in the American courts is, that the averment of the want of probable cause is of the *gist* of

Syllabus.

this action. We do not, however, hold that the words—"without any reasonable or probable cause"—are indispensable. Language may be used having the same meaning; and if this necessary averment of the want of probable cause is included in the sense of the declaration, it should be held sufficient. The averments in the declaration in this case are, substantially, that appellees, wickedly and maliciously intending to injure and ruin appellant, and extort money from him, procured the making of an affidavit and the issuance of a writ of attachment; and that they knew that the statements in the affidavit were false. If these averments be true, there could not have been any probable cause for the proceeding in attachment and the seizure of the property of appellant. If wilful perjury was committed—and this is charged—then there was no cause whatever for the prosecution. The averments in the declaration negative the existence of probable cause, and are equivalent to the positive assertion of a want of probable cause. *Savage v. Brewer*, 16 Pick. 456; *Maddox v. McGinnis*, 7 Monroe, 370; *Young v. Gregorie*, 3 Call, 386.

The averments in the declaration, and proofs offered, if they can be made, show a most iniquitous abuse of legal process to extort money; and courts of justice had better be abolished if they can afford no redress for such oppression. The court therefore erred in the rejection of the evidence offered. For the errors indicated, the judgment is reversed, and the cause remanded.

Judgment reversed.

GARDNER S. CHAPIN *et al.*

v.

MOSES W. DAKE.

1. GAMING—indorsement of commercial paper in consideration of, void. A party in possession of two drafts for \$1000 each, drawn in his favor,

57	295
129	254
57	295
30	30
57	295
155	629
57	295
107	401
57	295
1218	1265

Syllabus. Statement of the case.

having lost \$1500 at gaming, indorsed the same and delivered them to the winner, receiving by way of change, \$500 in money: *Held*, that under our statute against gaming the indorsement was void, and the property in the drafts remained in the payee; and although in the hands of an innocent holder for value, the legal consequence of such an indorsement must, under the statute, be the same—that no more effect could be given to it than to a forged indorsement.

2. *SAME—chancery, jurisdiction.* A court of equity has jurisdiction in such case to compel the holder to surrender the drafts to the payee.

3. But the payee, to entitle him to recover the drafts, should pay to the holder the \$500 which he received by way of change in paying his loss with the drafts.

4. *SAME—interest, whether can be recovered.* Nor should he be allowed interest on the drafts. All the statute enables him to recover, is the money or thing lost, with costs.

5. *COSTS—in such case—against whom to be adjudged.* The payee having filed a bill in chancery in which the first indorsee, the drawer, and the holder of the drafts, were made parties defendant, to enjoin their payment by the drawer to the holder, the drawee having refused to pay them, and to have his indorsement cancelled and the drafts delivered up to him, upon a cross bill filed by the drawer, averring his readiness at all times to pay the drafts to the lawful owner, and offering to pay the amount into court, with prayer that the different claimants interplead and settle the ownership of the drafts, it was *held*, a decree allowing the complainant in the cross bill \$100 for solicitor's fees was erroneous. Only his costs should have been allowed.

6. In such case the costs of the original, but not of the cross bill, would be properly adjudged against the first indorsee.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

This was a suit in chancery, brought by Moses W. Dake, against John Donaldson, the Fifth National Bank of Chicago, and Gardner S. Chapin and J. J. Gore, partners, doing business under the firm name of Chapin & Gore, to have two certain drafts for \$1000 each, in the hands of Chapin & Gore, delivered to the complainant, in whose favor they were drawn by the Fifth National Bank of Chicago, on the Ninth National Bank of New York, and by him indorsed to Donaldson; and to have his indorsements thereof cancelled, and to enjoin the payment

Statement of the case.

of the drafts by the Fifth National Bank of Chicago, the Ninth National Bank of New York having refused to pay them to Chapin & Gore, to whom Donaldson had indorsed them. The Fifth National Bank of Chicago filed a cross bill, averring its readiness at all times to pay the drafts to the lawful owner, but alleging that as there were several claimants it could not pay, etc., without an order of court, concluding with prayer, that Dake, Donaldson and Chapin & Gore interplead and settle the ownership of the drafts; offering to pay the amount into court, or to either litigant, being indemnified by the court, and praying that all the litigants be restrained from bringing suit against it for the collection of the drafts.

Donaldson failing to answer either the original bill, or the cross bill of the Fifth National Bank, default and decree *pro confesso* were entered against him as to both bills.

Upon a final hearing, the court found the property in the drafts to be in Dake, and that he was entitled to the money specified therein, less the sum of \$100 to be paid to the solicitors of the Fifth National Bank for fees, and ordered that the Fifth National Bank pay into court for Dake the sum of \$2000, less \$100 for solicitor's fees; that the injunction issued on the original bill be made perpetual; that Chapin & Gore and Donaldson pay the costs of suit, and that Chapin & Gore pay all costs on the cross bill; that upon payment of \$1900 by the Fifth National Bank into court, it should be forever released from any and all liability upon the drafts, and that the injunction issued on the cross bill be made perpetual; and that Chapin & Gore pay Dake \$56.67 interest upon the face of the drafts, and the sum of \$100 retained by the Fifth National Bank out of the drafts, in all \$156.67, with interest on that sum from the date of the decree.

Chapin & Gore appeal.

Mr. C. M. HARDY, for the appellants.

Mr. W. T. BURGESS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery, filed by Moses W. Dake, to have two certain drafts for \$1000 each, drawn by the Fifth National Bank of Chicago, upon the Ninth National Bank of New York, payable to the order of said Dake, at sight, by him indorsed and in the hands of Chapin & Gore, delivered to said Dake and the indorsements cancelled, and to enjoin the payment of the same to Chapin & Gore, on the alleged ground that the drafts were lost by Dake at gaming, and subsequently came into the hands of Chapin & Gore as indorsees.

It appears that Dake staked one of said drafts, after first indorsing it, and lost it, playing faro, and that it was delivered to one Donaldson, who was in some way concerned in receiving the proceeds of the faro bank.

That Dake then staked the other draft, lost \$500, delivered the draft, indorsed by him, in payment of his loss, and received from the dealer \$500 in currency in change.

The first section of the gaming act declares, that all promises, notes, bills, contracts or other securities made etc., upon any gambling consideration, shall be void and of no effect.

The second section enables the loser to recover, by action at law, from the winner, any money or valuable thing, or its value, lost at play, amounting to the sum of \$10.

The third section provides, that all notes, bills, promises, agreements, and other acts, etc., executed contrary to the provisions of the act may be set aside by any court of equity, etc.; and the fourth section provides that no assignment of any bill, note, agreement or other security, etc., as aforesaid, shall in any manner affect the defense of the person entering into or executing the same, or the remedies of any person interested therein.

Under the broad language of the statute, and within its true meaning, we think the indorsement of these drafts was void; that Chapin & Gore, although *bona fide* holders, acquired no

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title thereby in the drafts, and that the property in them still remains in Dake.

The indorsement of the drafts was a contract or agreement between the parties—it is said, that a transfer by *indorsement* is equivalent in its effect to the drawing of a bill; the indorsement was clearly void as between the parties to the transaction, and, we think, under the statute, the legal consequence must be the same of such an indorsement in the hands of a *bona fide* holder,—that no more effect is to be given to it than to a forged indorsement. Such a construction is necessary to effectuate the intention of the statute, and prevent its being avoided by making use of antecedent securities and transferring them to innocent parties.

Under the English statute of Queen Anne, substantially like ours, a bill of exchange or promissory note given for a gambling debt is held void in the hands of a *bona fide* holder. Chitty on Bills, 111 a, ed. of 1836. And it is so in those cases in which the legislature has declared that the *illegality* of the contract or consideration shall make the *security*, whether bill or note, void. Id. 115.

This act of indorsement was contrary to the provisions of the statute, and the third section provides that acts contrary to the provisions of the statute, may be vacated by a court of equity; and, under section four, no assignment of any bill, note, agreement, etc., shall in any manner affect the defense of the person executing the same, or the remedies of any person interested therein.

The appellee's loss was only \$1500; he has now in his hands \$500, which he received by way of change, in paying a loss of \$500 with a \$1000 draft. He can not hold that \$500, and recover the two drafts in full. He would thereby reap a profit of \$500 out of this gaming transaction; this he should not be suffered to do, by the aid of a court of equity. To entitle himself to the relief he claims, he must do equity by refunding to Chapin & Gore this \$500.

On the cross bill of the Fifth National Bank, it should not have been allowed \$100 solicitor's fees, but only its costs. It should have paid an additional \$100 into court.

There should not have been any allowance to the appellee of interest on the drafts.

All the statute enables him to recover, is the money or things lost, with costs.

The costs of the original suit, but not of the cross bill, would have been properly adjudged against Donaldson.

The decree of the court below must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

LAWRENCE, CHIEF JUSTICE, SCOTT, JUSTICE, and McALLISTER, JUSTICE: We can not concur with the majority of the court in holding that an innocent indorsee of the drafts in question, who has taken them in due course of trade, and upon a valuable consideration, should be required to surrender them.

SAMUEL DAVIDSON

v.

WILLIAM PORTER *et al.*

1. AGENCY—*purchaser*. A person purchasing of an agent is bound, at his peril, to see that the agent has authority to make the sale

2. CONTRACT—*what necessary to constitute*. The minds of the parties must come together on the terms and conditions of an agreement before there can be a contract.

3. POSSESSION—*of notice to subsequent purchaser*. A party in possession of lands claiming to have a contract with the owner for the purchase of the same filed a bill to compel a conveyance to him, a subsequent purchaser being made a party defendant: *Held*, the possession of complainant could

Opinion of the Court.

only charge the subsequent purchaser with notice of the facts as they existed; and there being no actual purchase by the complainant, his possession being unauthorized, the relief sought was denied.

APPEAL from the Superior Court of Chicago.

Messrs. HELM & HAWES, for the appellant.

Mr. J. W. WAUGHOP, for the appellee, Porter; and Mr. B. C. COOK, for the Railroad Company.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This controversy grows out of a claim on the part, both of appellee and appellant, that they had each purchased the land in dispute from different agents of the Illinois Central railroad company. Appellee filed his bill against the railroad company and appellant, to compel a conveyance to him. He alleges that he had purchased the land of an agent, had gone into possession, by fencing, breaking and cultivating the land, and paying for it before appellant purchased; that appellant had notice, actual and constructive. On the other hand, appellant denies that appellee had purchased, or that he had any notice that appellee claimed any right to the land, and insists he purchased of Sill, made the first payment, and received an obligation for a conveyance. The railroad company deny that Shellswick, of whom appellee claims to have purchased, had any authority to make a contract for the sale of the land; and claim that appellant's money was received, and a contract for a conveyance executed to him, before the officers empowered to sell had any notice of appellee's intention or effort to purchase.

Appellee introduced receipts for money paid to Shellswick, as the agent of the company, and testified in his own behalf, that he paid to Shellswick \$100 in October, 1866, and took a receipt therefor; and paid another \$100 in January, 1867, when he surrendered the first receipt and received one for

\$200; that another \$100 was paid in the March following; that \$60 more was afterwards paid, and completed the full payment for the land; that he took possession of it at the time he contracted to purchase, and the land had been fenced and cultivated since the spring of 1867. It appears that in the summer of 1867, it was cultivated in corn.

Davidson introduced on the trial the contract for the purchase of the land, dated the 16th day of August, 1867, and swore in his own behalf, that he made the contract with Sill on the 10th of that month; that he had paid on the land \$336; on the 12th of August \$118 to the company's agent at Clifton, \$112 to the cashier of the company the 15th of August, and to him \$106 on the 18th of the same month; that at his request Sill telegraphed to the officer having charge of the land department of the company to ascertain whether this land was for sale, before he purchased; that he knew nothing from appellee of his claim to the land until in October, 1868, but Shellswick wrote him a year previous to learn whether he would sell his claim to appellee, who, he said, had failed to get the land by reason of Shellswick's sickness; that he resided in Michigan at the time, and made the purchase within three or four days after coming to Iroquois county; that he had fulfilled his contract. He states positively that he had no conversation with Trescot before he bought the land; that no one told him the land had been sold, and he did not know it, and that he had no information that appellee was in possession when he purchased; that he told no person that when he purchased he intended to make appellee pay something for his claim and give him a road over the land.

In his evidence given on the trial below, Sill swears that he acted as land agent for the company at Clifton; that appellant, on the 12th of August, 1867, made application to purchase this with other lands; that the map showed this land for sale; that appellant paid him \$236, one-half of which was on the purchase of this land, and the money was remitted to the cashier of the land department of the company at Chicago; that a

contract for the conveyance was issued by the company on the 16th of that month; that in making sales they were governed by the map; that he knew nothing of the purchase of this land by appellee; that all applications to him were subject to approval by the company's land commissioner at Chicago.

On the trial, Waters, the cashier of the land department, testified, that the land business is transacted by the land commissioner, secretary and cashier, and contracts are executed by them; that they, on the 15th of August, 1867, received of appellant, through Sill, \$236, and a voucher passed to the sales department to be acted upon; that on the next day Shells-
wick forwarded \$360, which was received on account of appellee for the purchase of the land, and a voucher passed to the sales department for action; that Shellswick had then been in the employment of the company about two years.

Calhoun testified, that he was the commissioner of the land department of the company; that the land business was under his general charge, and land contracts were executed by himself, the cashier and secretary, on the part of the company, and also by the purchaser; that applications were received by himself, or by clerks acting for him; that they were received through station agents, commission agents, and often directly from the parties; that appellant's application was made through Sill, the station agent at Clifton, on the 14th day of August, 1867; the application, with the money for the first payment, was received at his office on the 14th of the same month, and the contract was issued on the 16th to appellant; that Sill telegraphed on the 12th, inquiring whether the land was for sale, and he replied it was; on the 14th Sill telegraphed that he had sold it at \$10 per acre; that at that time the records showed no other application to purchase this land, and he knew of no other; that Sill, or any other agent, had no authority to bind the company for the sale of lands, until the application was received by the commissioner at the land department; that it was the rule to confirm the application of the party whose money was first received, unless particularly

informed that application had been made and the money paid to a country agent, whose duty required him to receive the application and money, and report; that Shellswick was employed by the company, and received and reported applications for sale of lands; that Shellswick paid into the office for appellee, \$360, on the 16th of August, 1867, for the purchase of this land; that this money was returned to Shellswick for appellee, who refusing to receive it, it was held by the company, awaiting the result of the suit; that they had offered to return the money to appellant if he would surrender the contract, but he had declined; that subordinate agents had no authority to place applicants in possession of lands of the company, and Shellswick had no other or different authority.

On the trial below, Shellswick testified, that he was a traveling land agent for the company; that he agreed with appellee that he should have the land for \$360 cash in hand, which was a deduction of ten per cent from the price on a sale on time; that when appellee paid him the \$200, he desired witness to retain the money until he could obtain the balance, so as to have the benefit of a cash sale; that appellee agreed to pay the balance in one or two months; that he afterward, in March, paid \$100 more, and asked him to wait until the 5th of May for the balance; he consented to wait, and not sell the land until the latter date; that appellee knew that witness could not send the money forward in installments and have it treated as a cash sale, and he told appellee so many times; that on the day he sent the money for appellee, Sylvester and appellant called to see whether the land had been sold, and he informed them it had not, but appellee had agreed to buy but had not actually bought it, as he had not paid for it; that he did not report the payments made by appellee, and when he sent the money for appellee, he furnished of his own means the balance required to make up the requisite sum. Witness says he had no authority to sell lands on terms different from the rules of the company; had no authority to sell on cash terms and give time on the purchase; the arrangement between him and appellee was

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individual, and not with the company ; that he had no authority to bind the company by such an arrangement.

Has appellee on this evidence any right to the relief he asks? He fails to show any binding contract with the company. It is true, he paid a part of the price to the agent of the company, but with directions that he should retain it, and not send it to the proper officer of the company. He had not parted with the title to the money. He could, at any time, have refused to go on with the purchase, and have recovered it back. The company never had any contract with him which they could enforce. They had no claim to the money paid Shellswick. It was only deposited with him as appellee's banker until he could procure the balance, and then, and not till then, did he intend that his application to purchase and his money should be sent to the company's land agents authorized to make sales. Shellswick and Sill were not empowered to do any thing more than receive applications, give receipts for money, and forward them to the proper officers. And appellee was fully apprised of the fact by Shellswick, and chose, for the purpose of saving ten per cent on the price, to prevent an application from being made for a purchase on time. They had no authority to make sales or binding contracts for sale of lands. A person purchasing of an agent is bound at his peril to see that the agent has authority to make a sale. *Peabody v. Hoard*, 46 Ill. 242.

Then, the appellee having no contract of purchase with the company, and appellant having paid his money and entered into a contract with the company before appellee made his application to purchase, we are at a loss to perceive how appellant has become the trustee of, or holds, this property for appellee. It is insisted that appellant had notice, actual or constructive, of appellee's rights. Grant it. Then we have seen he had no agreement with the company, but has only shown that he intended to, and was preparing to purchase when he should obtain the requisite sum of money. He had an agreement that when he raised a certain sum of money he

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might become the purchaser, but this agreement was not with or binding on the company. It at most amounted to a proposition by the agent, that if he would pay \$360 he should have the land, but the proposition was not complied with, as the money was not paid until after the sale to appellant. He had not agreed with the proper agents of the company, or even proposed to them to purchase. They had not agreed to sell him the land, or he to pay the money, but had placed his money in the hands of Shellswick to keep until he obtained the balance of the sum, and he then intended to make application to become the purchaser.

Nor did the receipt given by Shellswick evidence a contract. Appellee did not have the remotest intention to purchase on credit, and he knew that to purchase for cash all the money had to be paid in hand,—Shellswick swears he repeatedly so informed him. We are at a loss to understand how he could have understood it to amount to a purchase, as he was bound to nothing, and had not even notified the company, or those authorized to act for it, that he even expected to become a purchaser. The minds of the parties must come together on the terms and conditions of an agreement before there can be a contract. And we fail to find that such was the case in this transaction. At most it was only the intention of appellee to purchase when he obtained the balance of the money, and of Shellswick to then make the application, which would be either accepted or rejected by the officers empowered to sell, according to the usage of the company. In this no element of a contract that can bind either party is perceived.

Appellant denies, unequivocally, that he knew who owned the fencing on the ground; that he had ever heard of any purchase by appellee, or had any knowledge of the fact. It is true, Trescot swears that appellant stated to him before he purchased, that he believed that appellee's contract was not regular, and he could hold the property if he purchased. Appellant denies the conversation; and when we consider that

Syllabus.

he was a stranger in the country, only having been there three or four days at most, it would be out of the ordinary course of human action for a stranger to talk to a neighbor of appellee about purchasing land for which he had a contract, and thus making a speculation, and we are inclined to believe that Trescot is at least mistaken, and that the conversation, if it occurred, was after appellant had purchased. He would not have been inclined to publish the fact in appellee's immediate neighborhood of his design to obtain such an advantage.

And the evidence, we think, establishes the fact that appellant had purchased before he and Sylvester called on Shells-wick, and he informed them of what appellee had done and intended to do in regard to the purchase, as he says he sent the money on that day, and appellant's money was received one day in advance of appellee's. Appellant clearly paid his money first, and obtained the contract. The entire evidence fails to establish a purchase by appellee, and his unauthorized possession could only charge appellant of the facts as they existed; and there being no purchase by appellee, he has established no right to the relief sought.

The decree of the court below is reversed, at the costs of Porter, and the cause is remanded.

Decree reversed.

THOMAS C. HALL *et al.*

v.

THE PEOPLE *ex rel.* JAMES H. ROGERS *et al.*

1. MANDAMUS—*petition for, to compel commissioners to open highway—*
ascerments therein, whether sufficient. Upon the filing of a petition for a writ of mandamus to compel the commissioners of highways of a certain township to take the necessary steps to open a road, which, as alleged, had been already laid out by a former board of commissioners of the township, and

57	307
125	341
57	307
137	626
57	307
171	517
57	307
178	609
57	307
179	172
57	307
95a	1287
57	307
198	571
57	307
208	277

Syllabus.

the damages to the several parties over whose land the road was to be constructed had been assessed against them, it being objected that it did not appear that the relators were citizens of the town, although it was regarded as more accurate if the petition had contained an express averment that the relators resided in the township, yet it appearing from the record that one of the relators was one of the commissioners who laid out the road, and that the other was one of the petitioners for the same, and so described in the proceeding, such allegation being nowhere in express terms denied in the return to the alternative writ, it was *held* sufficient in that regard.

2. *SAME—who may institute the proceeding.* The act sought to have performed by the respondents, being a public duty, in which the people of the whole town were interested, any citizen of the town had the right to become a relator and institute the proceeding. It was unnecessary for the relators to show they had any other interest in the object of the writ than that of mere private citizens interested in common with the public in the performance of the act.

3. *HIGHWAYS—laying out the same—action of majority of commissioners only required.* In laying out the road, the action of a majority of the commissioners thereon, was sufficient to render their proceeding valid, the statute having expressly provided that whenever the commissioners of highways shall receive a petition for a highway, that “they, or a majority of” them “may proceed to act in the premises.”

4. *SAME—assessment of damages on lands over which constructed—agreement with owners thereof.* Upon objection that the commissioners never sought to agree with the several owners of land over which the road was to be constructed, before they proceeded to assess the damages that they would severally sustain, it was *held*, not indispensable that they should. They might lawfully proceed to assess the damage without first inquiring of the owner of the land whether they could agree with him as to the amount of damage he would sustain, that part of the statute being simply directory and not mandatory.

5. *SAME—location thereof—mandamus—notice to remove fences.* The respondents in their return, claiming they were not bound to execute the writ, for the reason it was not their duty to open the road until after the owners of land over which the road would pass had been legally notified to remove their fences, and averring that no such notice had ever been given or served, it was *held*, such allegation presented an immaterial issue. The object of the proceeding being to compel the commissioners to take every initiatory step and to perform all official acts necessary to open the road, if the requisite notice to remove fences had not been given as required by the statute, and the proceedings in laying out the road were in all other respects legal, it was their duty to, and they should be compelled and required to give such notice.

Syllabus.

6. *SAME*—of notice to owners of land over which located, to remove fences—extension of time by commissioners. As a general rule, the sixty days notice required by the statute to be given to the owners of land over which a road has been located, to remove their fences, should be given upon the laying out of the road, if the determination of the commissioners shall not have been appealed from. But, although there does not appear to be any express authority conferred upon the commissioners to give an extension of time, that provision of the statute should have a reasonable construction, and doubtless, cases may arise where it would not be the duty of the commissioners to proceed at once to open the road; as where a road has been laid out through cultivated and enclosed lands, at a season of the year when there are growing crops on the same, it would not be unreasonable to allow the owners sufficient time to gather their crops. Yet the mere fact that it would be impracticable, on account of the wet weather of the season succeeding the time at which the road is located, to open and put the same in repair, would not of itself be sufficient to authorize the commissioners to give an extension of time for the removal of fences. Or where the owners of lands have planted crops after the final location of the road, it seems they should not for that reason be allowed an extension of time for the crops to mature and in which to gather the same.

7. *MANDAMUS*—to compel commissioners to open highways—whether the proper remedy. Upon it being insisted that inasmuch as the law imposed penalties upon the commissioners of highways, Sess. Laws 1861, page 248, section 13, for neglect of duties enjoined upon them, that therefore a person although interested in the performance of those duties could not invoke the aid of a writ of mandamus, it was held, that such was not a proper construction of that statute, the penalties there provided for being regarded as in addition to the common law remedies—that act in no wise repealing the remedies to which a party would be entitled at the common law.

8. Nor does sec. 4, of the act of 1867, entitled “an act to reduce the act to provide for township organization, and the several acts amendatory thereof into one act,” which provides a mode for compelling the construction and repair of bridges and roads, where the same have been neglected by the town authorities, in any wise affect the common law remedies to which a party is entitled, or have any application, in cases of this character.

9. *SAME*—averment and proof—what necessary. It was held essential, in this case, to the awarding of the writ, that the relators should aver and prove that the damages assessed to the land owners on the route of the road, had either been paid or released, or that there was money in the town treasury with which to tender or pay the same, or that the necessary funds were otherwise under the control of the commissioners.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

Messrs. JOHNSON & HOPKINS, for the appellants.

Messrs. McCULLOCH & CRATTY, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This was a petition for a writ of mandamus, on the relation of James H. Rogers and Thomas Shaw, in the Circuit Court of Peoria County, against Thomas C. Hall, Noah Marshall, and Henry Shaw, commissioners of highways of the township of Radnor, to compel them to take the necessary steps, under the law, to open a certain highway, which it is alleged had been previously laid out by a former board of commissioners of said township.

The petition recites at length, all the proceedings had by the commissioners of highways in laying out the road in question, from the presentation of the petition for the same, by the requisite number of legal voters, down to the assessment of damages to the several parties over whose land the road is to be constructed.

To the alternative writ, issued herein, the respondents Noah Marshall and Henry Shaw made return :

First, That they are not bound to execute said writ, because the relators are private individuals, and do not appear to be citizens of the town of Radnor, and that the people and authorities of Radnor have the exclusive control of highways in said township.

Second, Because said highway is not a legal highway, for the reason, that only two of the commissioners acted in laying out the same.

Third, Because they are not bound to open said road, until after the owners of land over which the road will pass, have been legally notified to remove their fences; and they deny that any such notice has ever been given or served.

Fourth, Because the time has not yet elapsed within which the owners of the land had time given them, and were notified by these respondents, to remove fences, and because

the respondents, commissioners of highways, soon after their election, and before the commencement of this proceeding, in the exercise of their best discretion as commissioners, considering it impossible to open and work said road during the wet weather and spring of that year, did, in the month of May, 1869, inform and notify the owners of land, that the said road need not be opened until the first day of October, 1869, the respondents believing an earlier opening of said road impracticable, oppressive and useless, and so gave the extension of time aforesaid, as they well might do; that the owners of land acted in good faith on said notice, and that the time so given in which to open said road had not expired when these proceedings were instituted.

Fifth, Because said writ is not sufficient in substance and in material matter, for them to answer unto, or execute.

A demurrer was interposed by the relators, to the return, and all and every allegation thereof, which was by the court sustained. The respondents electing to stand by their return, the court awarded a peremptory writ of mandamus and gave judgment against the respondents for costs.

The appellants bring the cause to this court, and assign for error the following causes, viz:

First, That the court erred in sustaining the demurrer to the return.

Second, That the court erred in awarding the peremptory writ of mandamus in said cause.

Although the return is informal, and technically defective, we have not for that reason, sought to avoid the consideration of the questions attempted to be presented by the return.

In considering the first error assigned, we propose to notice the objections to the legality of the proceedings in laying out the highway in question, and the reasons for not opening the same, in the order presented by the appellants in the return itself.

By the first allegation in the return it is averred, that it does not appear that the relators are citizens of the town of Radnor,

in the county of Peoria. This objection is not well taken. Upon inspection of the record, we think it sufficiently appears that the relators were not only citizens of the county of Peoria, but also residents of the town of Radnor, in which the road in question is situated. It appears from the record that one of the relators was one of the commissioners who laid out this very road, and that the other was one of the petitioners for the same, and is so described in the proceedings, and this allegation is nowhere, in express terms, denied in the return. It would doubtless have been more accurate if the petition had contained an express averment, that the relators resided in Radnor township.

It is insisted, however, that the relators in this instance were mere private citizens, having no other interest in the highway than the public generally, and therefore, that neither the alternative nor the peremptory writ should have been awarded on their relation. The respondents deny that a mere private citizen, if he has no other interest than the public in general have in the performance of a duty by a public officer, can invoke this extraordinary writ, and thereby put the machinery of the law in motion for the benefit of the public. It is apparent that if these relators resided in the township, they would have an interest, in common with all other citizens of the town, in having this highway opened to the public use. It would be most extraordinary if commissioners of highways could stand still and say that they alone are invested with the sole discretion to say when and in what manner they will perform the public duties imposed by their office, and that no mere private citizen can call upon the courts to compel them to perform those public duties in which all are alike interested. Such is not the law. It is undoubtedly true, as a general rule, that where a party invokes the aid of this writ, he must have some interest, special to himself, or in common with the public, in the performance of the act he seeks to compel. A mere stranger can not officiously interfere to compel the performance of an act in which he has no interest whatever,

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for the very satisfactory reason, that it is supposed the real parties in interest, when they desire to have the act performed, will move in the matter of their own motion.

The case of *The County of Pike v. The State*, 11 Ill. 202, is conclusive on this point. It was there said, that "where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the right in question enforced."

The rule there stated was approved by this court in the case of *The City of Ottawa v. The People*, 48 Ill. 233.

In this instance the act to be performed by the appellants, is a public duty, in which the people of the whole town are interested, and no doubt is entertained of the right of any citizen of the town to become a relator and institute this proceeding.

It is alleged in the return, that only two of the commissioners acted in laying out the highway in question, and it is insisted for that reason, that the acts of the two were void, without the presence of the third one. It is a sufficient and complete answer to this objection, that the statute (Gross' Comp., § 53, art. 17, p. 771,) has expressly provided, that whenever the commissioners of highways shall receive a petition for a highway, "they or a majority of" them "may proceed to act in the premises." It was, therefore, no valid objection to this road that only two of the commissioners acted originally in locating the same.

It is further objected in the second allegation, that the commissioners never sought to agree with the several owners of land over which the road was to be constructed, before they proceeded to assess the damages that they would severally sustain. It was not indispensable that they should. They might lawfully proceed to assess the damage without first inquiring of the owner of the land whether they could agree

with him as to the amount of damage he would sustain. That part of the statute was simply directory, and not mandatory.

The third allegation of the return, presents an immaterial issue. If no notice had been given to the land owners to remove their fences, as the law directs, it was the plain duty of the appellants to give such notice. No other persons could lawfully give the notice, and they can not be permitted to avail of their own neglect. The object of this proceeding is to compel the appellants to take every initiatory step, and to perform all official acts necessary to open the road, and if the requisite notice to remove fences has not been given, as required by the statute, they should be compelled and required to give such notice, if the proceedings in laying out the road are in all other respects legal.

The fourth allegation in the return is in no wise responsive to the writ, but sets up by way of excuse for their action in not opening the road, that the respondents, in May, after their election in April, 1869, notified owners of land over which the road passes, that they would not be required to open the road until the first day of October following, which time had not elapsed when this writ was sued out. The reason assigned by the respondents for giving the extension of time in which to open the road, is, that it would be impracticable during the wet weather of the spring and summer of that year to open and put the same in repair.

The demurrer of course admits the truth of this allegation, and the question arises, had the commissioners of highways, the respondents, any authority, under the statute, to give such an extension of time for the opening of the road? The record discloses that the final order, establishing the highway, was made by the supervisors, to whom an appeal had been taken, on the 24th day of November, 1868. By the statute (Gross' Comp., p. 76, § 90) it is provided, that whenever the commissioners of highways shall have laid out any public highway through enclosed or improved lands, and their determination shall not have been appealed from, they shall give the owners

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of the land through which the road passes, sixty days notice in writing to remove their fences. As a general rule the notice should be given upon the laying out of the highway, if the determination of the commissioners shall not have been appealed from. There does not appear to be any express authority conferred on the commissioners of highways to give an extension of time. This provision of the statute, however, should have a reasonable construction. Doubtless a case might arise where it would not be the duty of the commissioners to proceed at once to open the road. For instance, where a road has been laid out through cultivated and enclosed lands, at a season of the year when there were growing crops on the same, it would not be unreasonable to allow the owners sufficient time in which to remove their fences. But no such state of facts is alleged in the return, as would authorize the commissioners to give an extension of time. The road in question had been located the previous fall, and if there were any crops on the land at the date of the extension of time, the same were planted by the owners, with the full knowledge of the location of the road.

If they could extend the time for the causes set forth in the return for six months, they could for one year, and so on until the limitation of five years, in which the road could be opened would expire. The commissioners have no such authority under the statute.

It is insisted that inasmuch as the law imposes penalties upon the commissioners of highways (Sess. Laws 1861, p. 248, § 13,) for neglect of duties enjoined upon them, therefore a person, although interested in the performance of those duties, can not invoke the aid of the writ of mandamus. Such is not a fair construction of that statute. The penalties there provided for are in addition to the common law remedies, and that statute does not, and was not intended by the legislature, to repeal the common law remedies to which a party would be entitled.

The act of 1867 (Sess. Laws, p. 173, § 4,) to which our attention has been called, has no application whatever to a case of this kind.

We are therefore of opinion that the extension of time given by the commissioners of highways to the owners of land over which the road would pass, in which to remove their fences, is without authority of law, and is void, and would constitute no valid objection to the issuing of the peremptory writ of mandamus.

The second error, viz: that the court erred in ordering the peremptory writ of mandamus to issue is well assigned.

A party can not be compelled to perform an act, unless it is made to appear, affirmatively, that it is his clear duty to do so. The party that seeks to compel the performance of an act must set forth every material fact necessary to show that it is the plain legal duty of such party to act in the premises, before the courts will interfere. Any other rule would often do great injustice.

The petition in this case is manifestly defective, in not averring that the damages assessed to the land owners on the route of the road have been paid or released, or that there is money under the control of the commissioners of highways with which to tender or pay the damages so assessed. No man can be compelled to part with his property without just compensation. This is a constitutional right that he can not be deprived of by any statute. No corporation, public or private, can appropriate the property of any one to their own use without first tendering or paying the damages assessed under the forms of the law. The party ought not to be driven to his action against a corporation, responsible or irresponsible, for his damages. This would be to take his property without first making compensation and would be a plain violation of a constitutional right.

Under the peremptory writ awarded in this case, if the damages have not been paid, or released by the owners of the land, it would be the duty of the commissioners of highways to tender such damages before proceeding to open the road. It was therefore material that the relators should aver in their petition, and prove, that the damages which had been assessed

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to the land owners, had either been paid or released, or that there was money in the town treasury with which to pay the same, or that such funds were otherwise under the control of the commissioners. This fact not appearing, it was error in the court to award the peremptory writ of mandamus.

For the error indicated the order of the court will be reversed and the cause remanded, with leave to the relators to amend their petition so as to show that the damages assessed to the several land owners have been paid or released, or that there is money under the control, or subject to the order of the commissioners of highways, with which to pay the same, and also to show affirmatively that the relators were residents of the township of Radnor.

Judgment reversed.

FRANCIS M. GRIFFIN

v.

THE CITY OF CHICAGO.

87	317
145	612

1. *SPECIAL ASSESSMENTS in Chicago—certificate of publication.* The certificate of publication of the notice of an application for judgment upon a special assessment, did not state that it was published a certain number of days, "exclusive of Sundays and holidays," but certified that the notice had been published ten days consecutively, commencing with the 18th day of January, 1869: *Held*, the certificate was sufficient, as, from the language used, the court could ascertain the dates of the first and last papers containing the notice.

2. *WITNESS—impeachment.* A party can not impeach a witness called by himself, by proving that he had made contrary statements out of court.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an application for a judgment, in the court below, upon a special assessment warrant.

Syllabus.

The owner of the property against which the judgment was rendered, sued out this writ of error.

Mr. EDWARD ROBY, for the plaintiff in error.

Mr. M. F. TULEY, for the defendant in error.

Per CURIAM: We have carefully and repeatedly examined the record in this case, and find no error in it. The certificate of publication of the notice of the application for judgment differs from those we have held bad, in that it does not have the words, "exclusive of Sundays and holidays," but certifies that the notice has been published ten days consecutively, commencing with the 18th day of January, 1869. When such language is used in the certificate, as that the court can ascertain the date, of the first and last papers containing the notice, it is sufficient. There is nothing here to interrupt the court.

None of the evidence offered constitutes any defense. Plaintiff in error having called Harkness as a witness, had no right to impeach him, by proving that he had made contrary statements out of court.

No error appearing in the record, the judgment of the court below must be affirmed.

Judgment affirmed.

ROSELL M. HOUGH

v.

THE ÆTNA LIFE INSURANCE COMPANY.

1. PAYMENT—*subrogation*. A mere stranger or volunteer can not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. But if the person who pays the debt, is compelled to pay, for the protection of his own interests and rights, then the substitution should be made.

57	318
121	597
57	318
124	207
125	416
57	318
149	848
57	318
79a	323
57	318
95a	1240
57	318
99a	1621
57	318
199	1104

2. So where a general agent of an insurance company had appointed a local agent, and taken a bond from him in the name of the company, with sureties, conditioned that the local agent should pay over all moneys received by him, and the general agent paid to the company certain premiums received by the local agent, but not accounted for by him, it was *held*, in a suit upon the bond thus given, in the name of the company, for the use of the general agent, that inasmuch as the latter had the appointment of the local agents, and was bound, not only by contract with the company, but in order to maintain his position, to pay over all moneys received through local agents, his settlement with the company of the amount of the defalcation of the principal in the bond, before suit brought, did not operate to discharge the bond, but he had the right to be subrogated to the rights of the company in respect thereto.

3. NOTICE to surety—*whether required*. In such case, the surety in the bond, and his principal, being equally and primarily liable to the obligee, no notice to the surety of the defalcation of his principal, was necessary in order to fix the liability upon the bond.

4. SURRENDER of securities—*whether necessary*. The principal in the bond, the local agent, having given his promissory notes to the general agent for the amount of his defalcation, they should have been surrendered on the trial of the suit on the bond, or proof made that they had been given up, in order that a judgment could be properly entered.

5. PAYMENT—*by means of other securities*. If the notes, however, had been received in actual payment of the defalcation of the maker, that would operate as a discharge of the liability on the bond.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

Messrs. WILSON & VALLETTE, for the appellant.

Messrs. BRACKETT, WAITE & DRISCOLL, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Wallis, as principal, and appellant, as his surety, executed the bond sued on, with the condition annexed, that Wallis, as a local agent of the company, would pay over all moneys received by him, less his commissions.

Raymond, for whose benefit the suit was brought, was the general agent of the insurance company, and, by his contract, was bound to pay over all moneys received in the general

management of the affairs of the company; and had paid, before suit, the amount of the defalcation of Wallis, who was bound to make monthly returns; and when he failed to pay the money, he gave to Raymond promissory notes to be paid within a few days. These notes had not been surrendered at the time of the trial.

Three questions arise:

First. Was the settlement of the delinquencies of the local agent, by the general agent, a payment and discharge of the bond, so as to prevent subrogation.

Second. Is the security released because no notice was given to him of the defalcation of the principal.

Third. Should the notes have been surrendered before judgment?

Raymond was not co-surety, and it can not properly be assumed that he paid the defalcation as such. Suretyship is an accessory agreement, by which one person binds himself for another already bound. Whereas the liability of the general agent was distinct from, and anterior to the liability of the obligors to the bond.

The principle of subrogation has special application to the facts of this case.

The rule is, that if the person who pays the debt, is compelled to pay, for the protection of his own interests and rights, then the substitution should be made. A mere stranger or volunteer can not thus be subrogated to the creditor's rights.

By the terms of the agency, the principal agent was responsible for all premiums. This liability arose, not only by contract, but from his relation to the company, and to the local agents, and his right to appoint them. His reputation was involved, and his position could alone be maintained by the regular monthly payment of all sums received by the local agents. He was compelled to pay, not only by agreement prior to the date of the bond, but for the protection of his own rights.

The obligation, then, of the general agent to the company, was wholly independent of the obligation of the local agents.

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In the payment of the defalcations of the local agent, the general agent only discharged his own liability. He only complied with his own agreement, for the purpose of maintaining his position.

He had the general management of the affairs of the company; upon him rested the entire responsibility; to him alone did the company look for the payment of premiums, and the local agent was his appointee. He, therefore, acted under compulsion, in the payment of the premiums.

Such payment was the mere performance of a duty, the fulfillment of an agreement on the part of the general agent, and should not be regarded as an absolute payment of the bond. There was nothing voluntary about it, and we can not presume that it was intended by the one party, or accepted by the other, as a satisfaction of the bond.

We think the payment should only be considered as a discharge of the general agent, and not a discharge of the bond. Such, evidently, was the intention. The contrary construction would make the act of the party operate directly opposite to the intention of the general agent, and to justice. The acceptance too, was not in satisfaction of the bond. This never could have entered into the minds of the parties. Looking at all the facts, the duty and contract of the principal agent to make regular monthly settlements, the fact that no allusion was made to the defalcation, and the strong probability that nothing was ever known by the company of the bond of the local agent, we must presume the payment of the premiums as intended and accepted entirely for the relief of the general agent, and not a release of the liability of the local agent.

The second objection, that notice was not given to the surety, can not be maintained.

So far as the rights and remedies of the insurance company are concerned, appellants and Wallis are both principals. Hough was primarily liable for any defalcation, and the company was not compelled to sue Wallis, before resorting to its remedy

against the surety. When two persons execute a bond, one as principal and the other as surety, one is equally bound to the obligee as the other.

In the cases to which reference has been made, there was a different relation between the parties. In *White v. Walker*, 31 Ill. 422, the question arose, as to the necessity of notice to a guarantor before the commencement of suit against him. The liability was secondary, dependent on the default of the lessee. Under such circumstances, this court held, that it was but reasonable the guarantor should have notice of the default before suit, so that he might make payment.

In the case of *Babcock v. Bryant*, 12 Pick. 133, the undertaking of the defendant was collateral only. The relation of guarantor and guarantee existed, and the court held, that in such case there must be reasonable notice.

In this case the surety did not agree to do something, upon the performance of some act of his principal. The undertaking of the surety was primary. He stipulated for no notice, but agreed to do a certain thing, in a certain specific event. This event, the failure of the principal to pay over all moneys collected, might have become known to him. He could easily have obtained the requisite information. Ordinary inquiry would have afforded him a knowledge of the conduct of the principal. The default did not lie within the peculiar knowledge of the opposite party. In such cases no notice is necessary before suit. In *Orme v. Young*, 3 E. C. S. 84, the plaintiff sued upon a bond executed by his son and ten securities, for £22,000, payable by instalments of £1000 half yearly, until £9000 should be paid, at which time the residue was to be paid. Default was made in the payment of the residue of the principal sum, and continued so until the principal became a bankrupt. No notice had been given to the sureties of this default.

GIBBS, Ch. J., in delivering the opinion of the court, said: "A neglect to give notice to the surety, that the debtor had made default, does not discharge him." See also, *Taylor v. Bank*

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of *Kentucky*, 2 J. J. Marshall, 564; *Pittsburg, Fort Wayne & Chicago Railroad Company v. Shaeffer*, 59 Penn. State R. 350.

It was, however, error to render judgment on the bond without a surrender of the notes of Wallis. It is true, that Raymond terms them "cash tickets;" but the form given in the record, is that of an ordinary note for money.

It is wrong, in every view, to permit a creditor to retain notes, and also have judgment for the same indebtedness.

So far as appears from the record, these notes are still in the possession of Raymond, or he may have transferred them to third parties, and the debtor may be compelled to pay them.

They should be surrendered on the trial, or proof made that they had been given up, so that the debtor is released from his double liability.

If the notes had been received in actual payment of the defalcations, then the liability upon the bond is discharged. This fact should be inquired of by the jury.

The judgment is reversed and the cause remanded.

Judgment reversed.

ASAHEL PIERCE *et al.*

v.

PERRY POWELL.

AGENT—commission. A authorized B, as real estate agent, to sell for him twenty-one acres of land, at \$1500 per acre, B to receive a commission of 2 1-2 per cent on the sale. B afterwards received of a party \$1000, and gave a receipt therefor, in the name of A, by himself, which was to be applied as a part of the purchase money, if the party should finally become the purchaser of the land, but if he failed or refused to consummate the purchase within a specified time, he giving no obligation of any kind binding him to make the purchase, then the \$1000 deposit was to be forfeited. The

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trade was never consummated: *Held*, in an action by A against B, to recover the \$1000 forfeited, the latter contending that he was entitled to the money as commission on the sale at \$31,500, that at most, he was only entitled to the commission on the deposit.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. ROGERS & GARNETT, for the appellants.

Messrs. HOYNE, HORTON & HOYNE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In February, 1869, appellee authorized appellants, as real estate agents, to sell for him 21 acres of land at \$1500 per acre, one-third cash and the balance in one, two and three years, the unpaid purchase money to draw eight per cent interest per annum, they to receive a commission of 2½ per cent on the sale. On the first day of March, 1869, appellants received of James B. Rathburn \$1000, and gave a receipt therefor, in the name of appellee by themselves as agents, which was to be applied as a part of the purchase money, if he should finally become the purchaser of the land; but if Rathburn failed or refused to consummate the purchase, then the \$1000 deposit was to be forfeited. Rathburn, at the time, gave no obligation of any kind binding him to make the purchase, but simply paid the money for the privilege of purchasing at appellee's price and upon his terms, and the money to be forfeited if they failed to complete the purchase within a specified time.

Appellee furnished an abstract of the title, which being examined, was pronounced sufficient by Rathburn's attorney. Appellee then urged the closing up of the sale, but Rathburn failed to purchase, and forfeited the deposit. After spending some time in his efforts to close the matter, appellee demanded the deposit, and that the cloud created by the receipt, upon his title be removed. He was unable to obtain either. He then

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proposed to give up the \$1000, if appellants would procure a release from Rathburn. This they undertook, through Rathburn's agents, and Kerney, one of them, procured the release and took it to appellants' office. Whether it was delivered to appellants, is a disputed question. It, however, was afterwards delivered to appellee's attorney by Kerney. Appellee brought this suit to recover the one thousand dollars forfeited by Rathburn, from appellants.

Appellants claim to own the \$1000 on two grounds: first, as commissions on the sale of the property at \$31,500, and secondly, because they procured the quit claim deeds for appellee. An examination of the evidence fails to show that any sale was made, such as was contemplated when appellee intrusted the sale of the property to appellants. It is conceded that Rathburn executed no writing or signed any obligation. He only advanced the \$1000 upon the condition that if he failed to take the land he was to forfeit the sum thus deposited, and if he became the purchaser it was to be applied on the consideration he was to pay.

He only agreed to give the deposit for the privilege of purchasing for a period of time; if he failed to take the land on the specified terms, he forfeited the money, or if he took it, then he was to have it applied to the purchase. He declined, as he had the right to do, to take the land, and forfeited the deposit. How, then, can it be said that there was a sale, when under no circumstances could Rathburn be compelled to receive a deed and pay the money, or even to execute a contract. He was bound to nothing but the forfeiture of the deposit. He had not agreed, nor did he ever agree, to purchase the land, he only agreed that he would at a future time determine whether or not he would purchase. This was the extent of the arrangement and nothing more; and it wants the most essential element of a purchase or a sale, and that is, an obligation on the part of a purchaser to comply with the terms of the seller. Not having sold the land, appellants are not entitled to retain the money as commissions. They could

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not claim more than the commissions on the deposit, and that the jury have allowed them by their verdict. Appellants have referred to a number of adjudged cases, but they were all cases where a sale had been consummated, and hence have no application to the facts under consideration.

There seems to be no doubt that Rathburn's attorney delivered the deeds to appellee. This is, we think, clearly established by the evidence. And the evidence is conflicting, as to whether the attorney ever delivered the deeds to appellants. If he did, they must have again returned them to him, as the deeds came from him to appellee and not from appellants. It can not be truly said that appellants procured the deeds, when appellee's attorneys negotiated for and procured their delivery to them. Had appellants procured the deeds we should have expected them to have delivered them to appellee or to his attorneys. But the jury, under the evidence, have found that they failed to procure the deeds, and with that finding we do not incline to find fault as it was warranted by the evidence.

We do not see that there was any error in rejecting the evidence as to what appellee may have said in reference to how he should vote on the park question, or as to whether he voted as he had said he would. We will not presume, nor would it have been a legitimate presumption for the jury to indulge, that he could have exerted influence enough to have changed six votes, had he been disposed to have made the effort. Had his vote alone defeated the establishment of the park, and had it appeared that he induced Rathburn to purchase under a promise that he would vote for it, a different question might possibly have been presented. We can not infer, nor would the jury be warranted in the inference, that he could have changed the six votes appellants admit would have had to be changed before the park could be established. Evidence must be pertinent to the issue to be admissible, and it is not warranted by the rules of evidence to permit remote, disconnected circumstances from which reasonable inferences pertinent to the issue can not be drawn, to go to the jury. They confuse the issues,

tend to mislead, and to prejudice the case. The facts proposed to be proved, were too remote and were properly rejected by the court.

From an examination of the instructions given by the court, we are of opinion that they were fully as favorable, if not more so, than appellants had a right to demand, and that they did not tend to mislead the jury to their prejudice.

The judgment of the court below is affirmed.

Judgment affirmed.

ELIJAH C. BABCOCK *et al.*

v.

ORRA M. LISK.

1. **MORTGAGE**—*what debts are embraced therein.* A mortgage which recited that it was given to secure the payment of a certain promissory note described therein, "and also in consideration of the further sum of five hundred dollars," to the mortgagor in hand paid, the receipt whereof was thereby acknowledged, he had "granted, bargained, sold and conveyed" the premises described in the mortgage deed, was construed as a security given for the payment of the promissory note mentioned, and also the sum of \$500 of other indebtedness.

2. **SAME**—*parol proof of indebtedness secured thereby.* And the \$500 not being evidenced by any note or bond outside of the mortgage itself, it was competent, upon a bill to foreclose, to show by parol evidence the nature and character of such indebtedness and when contracted. That was in no sense enlarging the terms of the mortgage, but was simply showing the true amount of the consideration of the deed, and parol evidence is admissible for such purpose.

3. **INTEREST**—*at what rate recoverable.* The proof showing when the indebtedness other than that mentioned in the promissory note was contracted, and there being no special contract as to the rate of interest, it was not error for the court to decree the legal rate of interest thereon.

4. **PURCHASER from the mortgagor**—*how far chargeable with notice.* The fact that the sum of "five hundred dollars" was named in the mortgage, was, of itself, sufficient to put a subsequent purchaser of the mortgaged

premises on inquiry as to what was the true amount due under the mortgage, and if he purchased without making the necessary inquiries at the proper sources of information, he would be held to have done so at his peril. The mortgage being duly recorded in the proper office, a purchaser of the premises would be chargeable with notice of all it contained.

5. NOTICE—*when a party is chargeable therewith.* Where a party wilfully closes his eyes against the lights to which his attention has been directed, and which, if followed, would have led to a knowledge of all the facts, he will be chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. JOHN J. GLENN, for the appellants.

Messrs. STEWART & PHELPS, for the appellee.¹

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was a bill filed in the circuit court of Warren county, by the appellee, against the appellants and one Elijah F. Randall, to foreclose a mortgage. The appellants were judgment creditors of the mortgagor, Randall, and at a sale under a judgment against him, became the purchasers of the land covered by the mortgage. The ground upon which a reversal is sought, is, that the decree is rendered for a larger sum than that stated in the mortgage. The difficulty arises on the following clause contained in the mortgage, viz:

“Whereas, the said party of the first part is justly indebted to the said party of the second part in the sum of \$70, with three years interest thereon, secured to be paid by one certain promissory note, dated September 8th, for the sum of \$70, with interest: Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of five hundred

dollars to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed" the premises described in the mortgage deed.

The form of the mortgage is one of the usual blanks, and was, doubtless, filled up by a person inexperienced in drawing legal papers. It does not seem to us that the sum of "five hundred dollars" was named in the mortgage as a nominal consideration. The true construction of the mortgage, is that which was given to it by the circuit court, viz: that it was given to secure the promissory note of \$70, and also the sum \$500 of other indebtedness. The fact that the \$500 was not evidenced by any note or bond outside of the mortgage itself, rendered it entirely competent for the court to hear parol evidence to show the nature and character of the indebtedness, and when contracted. It was indispensable that such proof should be made. This was, in no sense, enlarging the terms of the mortgage. It was simply showing the true amount of the consideration of the deed, and this court has repeatedly held that parol evidence is admissible for that purpose.

The fact that the sum of "five hundred dollars" was named in the mortgage, was, of itself, sufficient to put the appellants on inquiry as to what was the true amount due to the appellee, and if they purchased without making the necessary inquiries at the proper sources of information, they must be held to have done so at their peril. The mortgage was duly recorded in the proper office, and the appellants are chargeable with notice of all it contained. The mortgagor, and the mortgagee's agent, resided in the immediate neighborhood, and the slightest inquiry would have put the appellants in possession of all the information necessary to their protection, before they made their purchase. Having failed to avail themselves of the information within their reach and readily accessible, they must suffer the consequences of their own ignorance. When a party wilfully closes his eyes against the light to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, he will be chargeable with

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notice of every fact that he could have obtained by the exercise of reasonable diligence. As to the question of notice, this case falls within the principles announced by this court in its former decisions. *Doyle v. Teas*, 4 Scam. 202; *Cox v. Milner*, 23 Ill. 476; *Ogden v. Haven*, 24 Ill. 59.

There was no error in the court in allowing interest. The proof showed when the indebtedness other than that mentioned in the promissory note was contracted, and the law, in the absence of any special contract as to the rate of interest, fixed the rate. The court, in the computation, only allowed the legal rate of interest, six per centum per annum.

Perceiving no error in the record, the decree of the circuit court is affirmed.

Decree affirmed.

JOSEPH KNOX *et al.*

v.

THE WINSTED SAVINGS BANK.

1. REMEDY—to vacate a judgment of a former term. A judgment of the circuit court can not be vacated for alleged error therein, upon motion entered in the same court at a subsequent term.

2. CONFESSION OF JUDGMENT—upon a joint and several note. A joint and several promissory note was executed by seven persons, and made payable on the order of two of the makers, by whom it was indorsed to a third person. Under a warrant of attorney to confess a judgment upon such note, according to its tenor and effect, it was held, that the power was substantially pursued in the confession of a judgment against five of the makers jointly, excluding the two on whose order the note was made payable.

3. SAME—vacating judgment—ground therefor. On a motion to vacate a judgment entered by confession, the question is not whether the judgment shall be vacated for error of law, but whether there exists any equitable reasons for opening the judgment.

4. And the fact that the judgment was confessed against several of the makers of the note jointly, but not against all, did not afford any equitable reason for vacating the judgment.

57 830
22a 31
57 330
33a 111

57 330
35a 87
37a 313

57 330
140 17
40a 447
41a 154

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152 50

57 330
157 265

57 330
57a 615

57 330
69a 132

57 830
201 190
57 330
114a 417

Opinion of the Court.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. OWEN & FOLLANSBEE, for the appellants.

Messrs. FULLER & SMITH, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This is an appeal from an order of the Superior Court of Chicago, overruling a motion to vacate a judgment rendered by confession, against appellants and one Carpenter, at the June term, 1870, of said court. The note and warrant of attorney upon which the judgment was rendered, were signed by the appellants and Carpenter, and also by "Tucker & Ritchie," to whose order the note was payable, and were joint and several.

At the July term, 1870, appellants Weber and Griswold, (two of the defendants below,) moved to set aside the judgment upon affidavits filed, alleging usury. At the same term, appellants Knox and Lawrence, (two other of the defendants below,) moved to vacate the judgment because of the alleged error in its rendition, that it was not entered against "Tucker & Ritchie," as well as the five actually made defendants.

Both these motions were heard at the same time, July 20, upon affidavits, and the motions granted, on condition that appellants pay into court, for appellee's use, the amount they admitted they originally received, with six per cent interest to date of payments claimed to have been made; and after deducting such alleged payments, interest at six per cent, on the balance.

This appellants refused to do, and their motions were overruled.

Affidavits were submitted on both sides upon the point, whether the note upon which the judgment was rendered, was assigned to the appellee before its maturity without notice of the alleged defense.

We think the affidavits establish, very satisfactorily, that the appellee was a *bona fide* assignee of the note in question before its maturity, and that there was not enough of a question in this respect raised, to make it worth while that an issue should be submitted to a jury to try it. Such being the case, there was no defense to the note disclosed, as against the appellee, and the court was justified upon this ground, in overruling the motion of Weber and Griswold.

The object of the motion of Knox and Lawrence, was to present a technical error alleged to exist in the rendition of this judgment, namely, that the judgment is against Knox, Lawrence, Griswold, Weber and Carpenter, and not against Tucker and Ritchie also.

This case, as now pending here, is an appeal from the order of the superior court, overruling the motion to set aside the judgment of a former term. It is not an appeal nor a writ of error from *the judgment itself*.

The mode of vacating a judgment for such an error of law, is not on motion, in the same court at a subsequent term.

To entertain such a motion, the court would, in effect, be sitting as a court of errors, to revise its own judgment.

But it is insisted, that the power given by the warrant of attorney was departed from in this case,—that the authority given was, to confess judgment against the makers of a joint and several note, according to the tenor and effect of the note, and that the judgment should only have been confessed against all the makers of the note jointly, or against them severally—that there was no authority to confess it against five of the seven jointly; and the case of *Roundy v. Hunt*, 24 Ill. 601, is referred to, where this court reversed an order of the court below overruling a motion to vacate a judgment confessed under a warrant of attorney giving a power to confess judgment on a certain contingency, and it not appearing that the contingency had happened, it was held there was no authority for confessing the judgment.

It must be considered that Tucker and Ritchie had authority to confess judgment against these five of the makers, as they could not have confessed a judgment against themselves in their own favor; and whether such authority passed to their assignee or not, we think it was substantially pursued in this case, in confessing the judgment against these five defendants jointly. Express authority was given to confess judgment against them severally, and we do not perceive what substantial ground of complaint they have, because one judgment was confessed against them all, instead of five separate judgments against them severally. It was a saving of costs to them. Had an ordinary action at law been brought against them, they could only have pleaded in abatement the non-joinder of Tucker and Ritchie.

The question properly before the court below was, not whether the judgment should be vacated for error of law, but whether, in the exercise of its equitable jurisdiction, there was any equitable reason for opening the judgment. *Rising v. Brainard*, 36 Ill. 79.

Upon this motion of Knox and Lawrence, no such equitable reason was shown for setting aside the judgment.

We are satisfied that the superior court properly refused both motions to vacate the judgment, and its decision is affirmed.

Judgment affirmed.

HENRY W. THOMSON

v.

BUCKNER S. MORRIS *et al.*

1. VOID AND VOIDABLE—*of a decree pro confesso, upon insufficient allegations.* If a person is in court by due service, as party to a bill praying a sale of lands in payment of certain judgments, on the ground that the lands

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57	333
40a	581
57	333
86a	554

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belonged to the judgment debtor, and the bill shows upon its face that such defendant claimed an interest which the complainant seeks to subject to sale because of its inferior equity, and was made a party that he might disclose his interest, but, neglecting to interpose any defense, a decree *pro confesso* is entered against him, such decree, however erroneous because the allegations in the bill as to the title of the defendant were not positive or specific, or because the bill failed to show the complainant did not have an adequate remedy at law, is not void, and a sale under its authority is not a nullity.

2. In such case, when the decree is collaterally assailed, it is sufficient to know that the defendants were in court by service or appearance, that the decree was one which a court of equity has power to make, and that the subject matter upon which it operated was brought by the bill before the court for adjudication.

3. So upon bill filed by a judgment creditor, to subject certain lands to sale for the satisfaction of the judgment, a third person, who had purchased a portion of the lands under another judgment against the same debtor, was made a party defendant. The only distinct allegation in the bill affecting the title of that defendant was, that at the time the complainant obtained his judgment, and at the close of the term when it was rendered, the judgment debtor owned the lands. The bill, however, charged that the defendant claimed some right or title to a part of the lands, in some way through the judgment debtor, and that he knew of complainant's superior equity in the lands when he acquired his interest therein, and asked that he might set forth what title or claim he had. The defendant was duly served with process, but, failing to make any defense, a decree *pro confesso* was entered and the lands sold thereunder. Upon bill subsequently filed by such defendant, to set aside the title thus acquired, as a cloud upon his title, upon the alleged ground that as there was no specific allegation in the bill in the former suit to the effect that the title claimed by him was for any reason subject to that judgment, the default admitted nothing to his prejudice, and the decree was void for the reason his title was not before the court for adjudication, it was *held*, that however erroneous that decree may have been for want of sufficient allegations in the bill, it was not void. The bill brought the question of the sale of the lands before the court for adjudication, and the subject was one of ordinary chancery cognizance,—so there was no want of jurisdiction in the court over the subject matter.

APPEAL from the Superior Court of Chicago.

MR. THOMAS S. McCLELLAND, and Messrs. ROSENTHAL & PENCE, for the appellants.

Opinion of the Court.

Mr. JAMES R. DOOLITTLE and Mr. R. H. FORRESTER, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

In July, 1844, Hubbard and Davis filed their bill in chancery against Egan, Blanchard and others, for the purpose of subjecting certain lands therein described to the payment of certain judgments obtained by Hubbard and Davis against Egan in the Municipal Court of Chicago. A large quantity of lands was described in said bill, and there were numerous defendants, besides Blanchard, who were distinctly charged with holding fraudulent titles under Egan. Blanchard, at that time, claimed title to a part of the lands described in the bill by virtue of a sale under a judgment against Egan in favor of one Church, rendered in 1837, at the same term of the same court at which Hubbard and Davis obtained their judgments. At this sale Blanchard, who was the assignee of the judgment, became the purchaser, and in 1840 received a sheriff's deed. Subsequently he conveyed to Thomson, the complainant in this case. The only distinct allegation in the above mentioned bill of Hubbard and Davis affecting the title of Blanchard, who had not then conveyed to Thomson, was, that at the time when Hubbard and Davis obtained their judgments against Egan, and at the close of the term when said judgments were obtained, Egan was the owner of the lands described in their bill, which included the land bought by Blanchard. The bill, however, charges that Blanchard claims some right or title to a part of said lands in some way through Egan, and that he knew of complainant's superior equity in said lands when he acquired his interest therein, and asks that he may set forth what title or claim he has. Blanchard did not answer the bill, and it was taken *pro confesso* as to him. In 1846 the court pronounced a decree ordering a sale of the lands to pay the Hubbard and Davis judgments. Under this

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decree the lands were sold in 1847, and the sale and deed having been subsequently reported to the court, they were approved, and a final order was pronounced confirming title in the purchasers, and decreeing that the deed of the commissioner be considered as a conveyance of the rights and interests of the defendants and each of them in the premises. This title has passed to the defendants in this proceeding, and the bill in this case was filed to set it aside as a cloud upon the title of complainant claiming under Blanchard, and being in possession. The superior court decreed in favor of the defendants and dismissed the bill. The complainant appealed.

It is urged by counsel for appellant that the decree *pro confesso* in the former suit, only established against him the allegations of the bill, and as there was no specific allegation to the effect that the title claimed by Blanchard was, for any reason, subject to the judgments in favor of Hubbard and Davis against Egan, the default of Blanchard admitted nothing to his prejudice, and the court had no right to decree the sale of whatever title he might have. It is insisted, in other words, that the bill did not bring Blanchard's title before the court for adjudication, and that in attempting to adjudicate upon it, the court was exceeding its jurisdiction as to the subject matter, and its decree was void. On the first argument of this case we adopted this view, but a rehearing having been awarded, we have given the case further consideration, and are satisfied our first opinion was erroneous.

The difficulty in the reasoning of appellant's counsel is, that they confound, and are obliged to confound, for the purposes of their argument, the difference between a decree merely erroneous and one void for want of jurisdiction. It may be conceded, for the purposes of this case, that the court should not, on the allegations in the bill of Hubbard and Davis, have decreed the sale of Blanchard's title, though he was in default. It may be conceded that Blanchard might, in proper time, have brought that decree to this court and have

had it reversed. But, nevertheless, it was not, as to Blanchard's title, a void decree. The court had jurisdiction over him by due service of process, and the subject matter of the bill was one of ordinary chancery cognizance. The bill was filed to subject certain lands situate in the county where the court was held to the payment of certain judgments. Blanchard was in court by service, the land was under the jurisdiction of the court, the bill brought the question of its sale before the court for adjudication, and the decree which the court was asked to make, and did make, in regard to it, was but an exercise of the plainest of chancery powers. The power may have been improperly exercised. Neither the bill nor the proof may have justified the decree. Nevertheless, the naked power or jurisdiction to make it can not be denied. The bill alleged that the complainants had obtained certain judgments against Egan, that the lands in question belonged to him at the date of the judgments and at the expiration of the term when they were rendered. This allegation showed that the judgments had been a lien on the lands, and unless it should be made to appear that this lien was subject to some other paramount lien or equity, the land ought to be sold for their payment. Blanchard might have demurred to the bill on the ground that, so far as it related to him, there was no necessity shown by it for coming into a court of chancery. It disclosed no reason why the complainants had not sold under execution, since it did not allege such a title or claim of title in Blanchard as would have interfered with such sale, or have clouded the title of the purchaser. It did not even allege, in general terms, that Blanchard claimed a paramount title. He might, therefore, have demurred, and asked that, as to him, the bill be dismissed. Or he might have answered and have shown his superior equity in the lands, if he had any. One of these two things he was bound to do, if he desired to protect his title. Not doing either, the court had the power to order the sale of the land, including his interest therein, although it would probably have declined to do so, if he had shown, by a demurrer,

that there was ample remedy at law for the complainants, so far as concerned him.

Deficient as the bill may have been in allegations showing the necessity of bringing Blanchard into court, the purpose for which he was brought there was nevertheless apparent. The bill alleged that he claimed an interest in the lands, but that he had notice, when he acquired it, of complainant's superior equity. He was thus informed that the bill sought, not only to have the lands sold, but also to have his interest in them sold, unless he should show, by his answer, that he had such an interest as would make their sale unjust. The allegations of the bill were thus sufficient to bring before the court the subject matter upon which it decreed, to wit: the sale of the lands in payment of the complainants' judgments.

Counsel for appellant cite numerous authorities for the purpose of showing that the decree was not an estoppel, so far as concerns the question whether the equity of Davis and Hubbard was superior to the title of Blanchard, because that question was not distinctly put in issue by the pleadings. But our decision is not based upon any ground of estoppel. The authorities cited relate to cases in which the attempt has been made to conclude the parties to a suit as to some matter of fact, upon the ground that the fact has been determined in some former litigation between the same parties. We may concede that, in any suit which may arise, Blanchard should not be estopped from proving, as a matter of fact, that he had, when that decree was rendered, the superior instead of the inferior equity. His grantee may prove it in this case, but the difficulty is, it avails nothing when it is proved, because his title, whether superior or inferior, was sold under the decree. The question is not one of estoppel as to any facts found by the decree, but simply as to the effect of a sale ordered by the decree to be made. This question brings us back to the starting point—the naked question of jurisdiction over the person and the subject matter. On that we can come to but one conclusion.

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The question is really not an open one in this court. In *Finch v. Martin*, 19 Ill. 111, several persons were made defendants, with the general averment that "they claim or pretend to have some title or interest in the premises, which is fraudulent and void." There was a demurrer to the bill, and this court held that the allegation was sufficient, saying the defendants were bound to disclose their title, if they had any, and if they had none, they should disclaim. Prior to that decision, it had been the common practice, in bills filed for the purpose of having land sold, to make persons defendants, by a general allegation of this character, and ask that they be required to disclose their titles. This was constantly done in bills to foreclose mortgages and bills to subject lands to the payment of judgments, for the purpose of clearing the title and cutting off rights of redemption. This case in 19th Ill. approved the practice, and it has now become a rule of property, under that decision, which it would be very wrong to shake. In that case the court held such a general allegation was good upon demurrer. In the bill filed by Hubbard and Davis, the positive allegation that the claim set up by Blanchard was "fraudulent and void" was not made, as it was in the case in 19th Ill. and in this opinion we have been disposed to concede that that bill was demurrable, on the ground that the inferiority of Blanchard's title to the equity of the complainants was only argumentatively shown, and it did not appear, as against Blanchard, why the complainants' remedy was not complete at law. But the case in 19th Ill. is directly in point, as showing that where a party is brought into court for the purpose of permitting him to set up his title to real estate in which complainants claim an equity, he must appear and defend, if he has interests which he desires to protect. If the allegations of the bill are defective, or the relief asked can be had at law, he may, of course, demur; but if he fail to appear at all, and the court decrees the sale of his land, he can not be permitted to say the decree was void merely because the allegations as to his title were not positive or specific. When the decree is

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collaterally assailed, it is sufficient to know that the defendants were in court by service or appearance; that the decree was one which a court of equity has power to make, and that the subject matter upon which it operated was brought by the bill before the court for adjudication.

If in court by due service, as party to a bill praying a sale of lands in payment of certain judgments, on the ground that the lands belonged to the judgment debtor, and if the bill showed upon its face that he claimed an interest which the complainant sought to subject to sale because of its inferior equity, and was made a party that he might disclose his interest, then the decree, however erroneous, is not void, and a sale under its authority is not a nullity.

The decree of the superior court dismissing the bill must be affirmed.

Decree affirmed.

JEVNE & ALMINI

v.

URI OSGOOD *et al.*

1. **VENDOR AND PURCHASER—rescission of contract by parol.** Where the parties to a written contract for the sale of land agree by parol to rescind the same, one of the conditions of such agreement being that the vendee shall return to the vendor the written contract to convey, it is *held*, that although the vendee perform all the other conditions, if he refuse to surrender the written contract he thereby keeps it alive, and refusing to release the vendor from his obligation to convey, he continues his own liability to pay the purchase money.

2. The verbal agreement to cancel could be set up as a defense to a bill by the vendor, to compel a surrender of the written contract, as being within the statute of frauds. He is not required, in such case, to abandon his claim for the purchase money and run the risk of having to perform his agreement to convey.

57	340
27a	432
57	340
28a	545
57	340
129	438
30a	118
57	340
33a	180
57	340
136	488
57	340
144	329
57	340
45a	425
57	340
51a	317
57	340
53a	487
58a	36
57	340
63a	376
57	340
79a	190
57	340
85a	680
57	340
88a	513
57	340
a188	7141
57	340
102a	*608
57	340
900	7401

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3. And even though the vendor could, under the terms of the written contract, declare a forfeiture on account of default on the part of the vendee, and thus terminate his own liability, he would not be bound to do so under such circumstances, but might still hold the vendee liable.

4. JURISDICTION IN CHANCERY—*defense at law*. Where a purchaser of land has an opportunity to defend a suit at law brought to recover the purchase money, on the ground that the contract of sale has been rescinded, but omits to interpose such defense, he will be deemed to have waived it, and can not, after permitting a judgment to be recovered against him, come into a court of chancery and set up the fact of such rescission as a ground for an injunction to restrain the collection of the judgment.

5. A party failing to make a defense at law, will not be permitted to come into equity and have the subject matter of such defense allowed, unless he can show he was prevented from making his defense at law by accident, fraud or mistake.

6. SAME—to enforce a judgment. A vendor of land having recovered a judgment at law for a portion of the purchase money, the vendee sought, by bill in chancery, to enjoin the judgment, on the alleged ground that the contract had been rescinded. The vendor, by cross bill, set up his judgment, and asked a decree for its payment: *Held*, the mere fact that he held the judgment, although it was for purchase money, did not entitle him to relief in equity, such as that sought by the cross bill.

7. DAMAGES—on dissolution of injunction—attorneys' fees. The statute providing for an assessment of damages on the dissolution of an injunction, was only intended to reimburse the defendant for moneys which he has paid, or for which he has become liable, on the motion to dissolve. He can not recover for attorney's fees arising from litigation upon a cross bill in the same suit, but not connected with the injunction, or from litigation under the original bill subsequent to the hearing on the motion to dissolve.

8. Nor, in case the defendant is himself an attorney and attends to his own case, can he be allowed a fee for his own services.

9. In ascertaining the amount which should be allowed as attorney's fee in such proceeding, it is not enough to prove by attorneys that the sum named is, in their opinion, reasonable. The inquiry should be, what has the defendant paid, or become liable to pay, and is it the usual and customary fee paid for such services. The chancellor should refuse to allow exorbitant and oppressive charges.

10. In this case, the sum of \$250 as an attorney's fee for entering and trying a mere motion to dissolve an injunction, was deemed excessive.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Opinion of the Court.

Messrs. RANDALL & FULLER, for the appellants.

Messrs. URI OSGOOD & SON, for the appellees.

MR. JUSTICE WALKER delivered the opinion of the Court :

This was a bill in equity, filed by appellants in the circuit court of Will county. The bill alleges that they entered into a contract with Osgood for the purchase of a lot in the city of Joliet, for the sum of \$1,000 ; and to be paid—\$400 in painting and fresco work on the Universalist church, \$200 on the first of September, 1859, and \$200 on the first of September in each of the years of 1860 and 1861, with interest at the rate of 10 per cent from the first of September, 1858, the purchasers to pay all taxes and assessments, and on failure to do so, the sums thus neglected to be paid to become part of the purchase money. On payment as agreed, Osgood was to convey the property to complainants. The contract contained a clause of forfeiture, at Osgood's option, in case of failure to pay ; the frescoing and painting to be done in ten weeks from the time of entering into the contract, which was the 24th of July, 1858.

The bill alleges that the painting and frescoing were done to the satisfaction of Osgood, and were accepted by him, who gave to them a receipt for the same ; that being unable to meet the first cash payment, they saw Osgood, and it was mutually agreed the contract should be at an end, and they supposed it was, but having failed to cancel the agreement, Osgood, on the 26th of September, 1860, commenced a suit in the Will circuit court on the agreement ; that, thereupon, one of the complainants saw Osgood and a new settlement was made, and Osgood, in consideration of \$50 then paid, and \$76 to be paid in twenty days, released them from the contract, and agreed to dismiss the suit at complainants' costs ; that complainants afterwards paid Osgood in work, to his satisfaction, \$103.40, which more than paid the \$76 and the costs of the

suit. At the last settlement, when they rendered their bill of work, Osgood gave them a receipt.

Osgood, on the 16th of November, 1866, notified them the costs had not been paid, when they offered to pay the balance if it exceeded their bill over the \$76; but he denied that the balance was to be so applied. Osgood did not dismiss his suit, but on the 24th of February, 1867, took judgment for \$787 damages, and \$27.70 costs; that they had no knowledge of the judgment until the following October, when the sheriff of Cook county served an execution issued thereon, upon them. The bill charges that the judgment was fraudulently obtained, is unjust, and prays an injunction perpetually restraining its collection.

The answer admits the sale was made, the agreement entered into, and that complainants did the work on the church, and giving the receipt, but charges they never fully did the same. Defendant denies any arrangement was made by which the contract was rescinded, although complainants, separately and at different times, called on him to procure its rescission; that after the third payment had matured, he brought suit against complainants; that after the suit was brought, Almini came to Joliet to procure a settlement, and it was then agreed that complainants should forfeit the \$400 paid in painting, &c.; should pay \$50 on the contract, and complainants should furnish paints, and paint defendant's house, blinds and fence, and pay the costs of the suit and surrender the contract, and defendant would then dismiss the suit; that the \$50 was paid, the painting partially done but not completed, but he was willing to have accepted it and dismissed the suit, if they had paid the costs; that he wrote complainants to return the contract, and sign a stipulation that the suit was to be dismissed at their costs, unless they preferred to receive a deed for the lot, which he was ready to execute, but they did not return the agreement, or sign the stipulation; admits he obtained judgment, but denies complainants ever paid the costs or surrendered the contract, as agreed.

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Osgood and Beveridge filed a cross bill, setting up substantially the same facts contained in the answer, offering to convey when payment should be made, and praying a decree for the amount due on the contract, and for damages on the dissolution of the injunction. On motion, the injunction was dissolved, and a suggestion of damages was filed, and afterwards a trial was had on the bill and answer thereto, the cross bill and answer thereto, replication, exhibits and proofs, when a decree was rendered that complainants pay the full amount of the judgment, including damages, costs, and interest thereon; also all taxes and assessments which have been paid by Osgood on the lot, and the sum of \$250 damages for his reasonable attorneys' fees, making in the aggregate the sum of \$1,562.49, and costs of the suit. To reverse which the record is brought to this court, and errors are assigned thereon.

Have appellants shown themselves entitled to the relief sought? They show that they saw Osgood, and terms were agreed upon for the cancellation of the contract, but it was never consummated. The contract which they held on Osgood was not returned as agreed. They had no right to retain it, when it was a part of the conditions upon which a cancellation was to be made that it should be returned. Osgood repeatedly wrote them to return it and pay the costs, and he would dismiss the suit, and thus consummate the arrangement for rescinding the purchase, but insisted he would prefer their paying the money and receiving a conveyance. He was urgent for them to do so; informed them he had an opportunity to sell the lot, but disliked to do so while his obligation to them was outstanding. They disregarded his urgent solicitations to close the matter, and failed even to reply to his letters. He continued the suit until in 1867, nearly seven years, endeavoring to get the matter closed up, either by canceling the contract, or by having them to fulfill it and receive a deed.

He was not bound to relinquish his claim for the purchase money, even under the agreement to cancel the purchase, until his obligation to convey was returned. He was not

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required to run the risk of having to perform the agreement, notwithstanding the verbal agreement to abandon the sale. Had he filed a bill to have the agreement surrendered up, they could have replied that the contract to cancel was verbal and within the statute of frauds, and unexecuted; or, had they filed their bill for a specific performance, and Osgood had set up the agreement to cancel, they could have urged that it was verbal, unexecuted, and void under the statute of frauds. It then follows, that by refusing to surrender the contract they kept it alive, and refusing to release him from his obligation to convey, they continued their own liability.

If it be urged that he could have declared a forfeiture, and thus have terminated his liability, still he was under no obligation to do so. He had offered to carry out the arrangement to rescind, he placed it upon the ground only that he was willing to perform his agreement, but in every instance distinctly stated he preferred to go on with the agreement. He said or did nothing to indicate that he desired or intended to declare a forfeiture. It was at appellants' solicitation he entered into the agreement to cancel, and it is their own fault if it was not carried out and they released. It then follows there was no ground for an injunction, and it was properly dissolved, and the relief refused under their bill. Again, appellants had ample opportunity to interpose the defense that the sale had been rescinded, in the suit at law, had it been true. Having this opportunity, and failing to interpose the defense in a suit at law, they must be held to have waived it.

It is a firmly established rule, that a party failing to make a defense at law, shall not be permitted to come into equity and have such a defense allowed, unless he can show he was prevented by accident, mistake or fraud. None of these grounds was shown to have existed in this case; on the contrary, appellants knew the suit was pending, and Osgood urged them to close the matter. They had known for years that the suit had not been dismissed, and that Osgood could at any time take judgment for the want of a plea, and still they made no

defense. The defense was complete at law, and they failed to make it in that suit, and are estopped from seeking relief in equity.

Was Osgood entitled to maintain his cross bill? He had already obtained a judgment for the second and third installments on the purchase of the lot. He showed no grounds in equity for converting the judgment into a decree. The mere fact that he held the judgment, did not confer jurisdiction upon the court of equity; nor did the fact that it was recovered as part of the purchase money for the lot. And if it be urged that the fourth installment was unpaid, still his remedy was complete at law. But even if equity could have entertained jurisdiction, still the payment of the money last due, and the conveyance, were simultaneous and concurrent acts under the agreement. Appellants were not bound to pay until he conveyed, or offered to convey. *Tyler v. Young*, 2 Scam. 444; *Scott v. Shepherd*, 3 Gilm. 483; *Brown v. Cannon*, 5 Gilm. 174. Osgood could not have recovered at law for this last installment without tendering a deed, as both that payment and the execution of the deed were acts to be done at the same time; and there is no pretense he ever delivered them, or offered to deliver them, a deed, nor does it even appear he had title that would have enabled him to convey. There was, therefore, no ground for entertaining the cross bill, and the court should have refused the relief and dismissed the cross bill.

The court below allowed an attorney's fee of \$250 in having the injunction dissolved. This seems to be a large sum for entering and trying a mere motion to dissolve the injunction. From the evidence in the record, it would seem that the fee was for trying the whole case. The design of the statute is not that the defendant shall, where the injunction is dissolved, recover his attorney's fees for all that has been, or may be, done in the case. To give the statute such an unreasonable construction, would render it an instrument of great oppression. It was only intended to reimburse the defendant for moneys

which he has paid, or for which he has become liable, on the motion to dissolve.

Again, the attorneys in this case only gave it as their opinion that the fee they name would be reasonable. Such proof is not proper and sufficient upon which to base the decree. It should be, What has the defendant paid, or become liable to pay, and is it the usual and customary fee paid for such services? It would not be proper to allow an extravagant fee, in view of the service, and that it might be collected of the plaintiff, or a conditional fee for a certain sum in any event, and an additional sum in case of a dissolution. It is the duty of the chancellor to refuse to allow exorbitant and oppressive charges. It is not proper, that the danger of being greatly oppressed by such damages in case of a failure to maintain an injunction, should be such as to deter men from seeking their rights by employing the necessary process of the court. The danger of oppression should not be so great as to obstruct justice, and to license the vicious to perpetrate acts of oppression with impunity. But a reasonable and fair compensation should be allowed to defendant for money actually paid to an attorney, or a liability fairly and honestly incurred to pay an attorney to procure the dissolution—such a fee only as he would pay if he had no hope of having it reimbursed.

In this case, we infer that Osgood recovered for the litigation on his cross bill, which was not necessarily connected with the injunction; also on the original bill, which was tried subsequently to the hearing on the motion to dissolve. And in addition to all of this, Osgood seems not to have paid, or become liable for, a single dollar for attorneys' fees. He seems to have attended to his own case. We do not believe the law intends that an attorney may claim of the opposite party a fee for attending to his own suit, much less one that seems to us to be exorbitant.

For the errors indicated, the decree of the court below is reversed and the cause remanded.

Decree reversed.

JOHN DONLIN

v.

FRANCIS HETTINGER *et al.*

1. NOTICE in statutory proceedings—must be made to appear. Where a court is called upon to exercise a power specially bestowed upon it by statute, not within its ordinary common law or chancery powers and jurisdiction, the fact the notice prescribed in the statute was given, it being a jurisdictional fact, must appear on the face of the proceedings.

2. That fact, however, may be made to appear from a proper recital thereof in the order or decree, which will be sufficient in a collateral proceeding, if there be nothing in the case to show that the finding of the court was not correct.

3. SAME—as to proceedings by an administrator to sell land to pay debts. In a proceeding in the circuit court by an administrator, for an order to sell the lands of his intestate to pay debts, a decree was entered reciting service of notice, but the recital itself showed the service was defective. That decree was afterwards set aside, the petition amended by substituting other lands, and another decree rendered, without, however, any new adjudication upon the fact of notice, nor did it appear anywhere in the proceedings that any other notice had been given than that recited in the first decree: *Held*, in a collateral proceeding, the presumption was, that the second decree was made under the notice referred to in the former decree, which being defective, the court failed to acquire jurisdiction of the persons of the heirs.

4. In a proceeding of this character, unless the mode pointed out by the statute for bringing the parties before the court is pursued, there will be such a want of jurisdiction as will vitiate the order of sale.

WRIT OF ERROR to the Superior Court of Chicago.

This was a suit in chancery, instituted by Francis Hettinger and George Oertel, against John Donlin and Catharine Fitzgerald, by which it was sought to enjoin an action of ejectment brought by Donlin and others, as the heirs of John Donlin, deceased, against the complainants.

The land in controversy had been sold under an order of the Circuit Court of Cook county, upon the application of the

administrator of John Donlin, deceased, to pay the debts of the estate.

The defendants in the action of ejectment deduced title from that sale. The question presented is, whether it appeared from the proceedings on the application of the administrator of John Donlin, deceased, for an order to sell the land, that the court had obtained jurisdiction of the persons of the heirs.

Messrs. ROSENTHAL & PENCE, for the plaintiff in error.

Mr. H. A. WHITE, for the defendants in error.

MR. JUSTICE BREESE delivered the opinion of the Court :

The only question made upon this record important to be considered is, the validity of the decree of April 23, 1849. The defendants in error, who were complainants below, claim nothing under the proceedings in 1846. Their counsel say the bill does not base any rights upon the decree of July, 1846, but only upon that of 1849; and conceding that the court had not then acquired jurisdiction over the persons of the defendants, it had over the subject matter by filing the petition, and if the order to sell was improvidently granted for that reason, then the leave to amend the petition and setting aside the order (of sale) was proper for the court to make. He also says that it is not filing proof of service of notice in any form that calls the power of the court into action—it is the filing the petition; and he further says, in this case it is of little consequence what the findings of the first decree were, as on amending the petition asking for the sale of other lands required new notice to be given, and then the case was continued, affording an opportunity to give the notice, and then the final order contains no recitals of proof of service of any kind. He insists, as there are no recitals of service in this decree, parties have the right to presume that due notice was given or the court would not have acted, otherwise the court

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must now announce the rule that unless the court recites it had jurisdiction of the person they will hold that it had not jurisdiction, and thus reduce the superior courts of the State to the condition of inferior courts at common law, who are always obliged to show jurisdiction of the person. He further says, that after the amendment of the petition was allowed, the record was no longer in the condition it was in when that order was made, and if the court intended to act only upon the notice that had been made prior to this amendment, an order would have been at once entered upon the amended petition; but instead of so doing, the cause was continued, and the only reason for that was, that notice might be given of the application, and as time enough elapsed within which the notice could have been given, it will be presumed it was given. Citing *Miller v. Handy*, 40 Ill. 448.

From this we understand the counsel to hold, that in a statutory proceeding like this, committed to a court of general jurisdiction, if the statute requires notice to be given, it is not necessary the proceedings should show it, as notice will be presumed.

We do not think the case he has cited, *Miller v. Handy*, *supra*, will sustain him in this proposition.

That was an action of ejectment, the defendant claiming under a judgment on *scire facias* to foreclose a mortgage. The validity of the judgment was attacked on the ground that it did not appear that two writs of *sci. fa.* had been returned *nihil*.

The court found that two writs of *sci. fa.* had been returned *nihil*. This, we said, was strong presumptive evidence of that fact, to be rebutted only by the clearest proof. The appellee insisted that the fact that the first writ, issued to the August term, being void, the return on it could not be regarded and was not to be counted as a return of one "*nihil*." To this we assented, but said the terms of court in Cook county were so arranged by statute, that there was time and opportunity to issue two writs of *sci. fa.* and have them returned, and as the court had

found there were two returns of "*nihil*," we would, in the absence of one of the writs from the files, hold the finding evidence of service, unless overcome by something appearing in the record.

We further said, the fact of service of process lay at the threshold of the case, and of which the court is to be informed and to pronounce with the same fidelity as upon any other fact in the cause, and there was nothing in the case to show that the finding of the court was not in strict accordance with the fact.

If in this case the decree of 1849, under which defendants claim, had recited the fact that due notice to the heirs had been given, it would have been like the case cited, and in this collateral action would have been sufficient.

The doctrine in 2 Howard, 319, *Grignon's lessee v. Astor*, is not, and has never been, the doctrine of this court, it always holding that the statute requiring notice of a particular kind, such notice must be given before jurisdiction of the person can be had. That notice is a jurisdictional fact.

This is a proceeding in a court of special jurisdiction; not by the court in the exercise of its common law or chancery powers and jurisdiction, but exercising a power specially bestowed upon it by statute, and the rule is well settled in such cases the jurisdiction must appear on the face of the proceedings. Without the statute, the circuit, or superior court, though courts of general jurisdiction, would have no jurisdiction in the case before us. This being so, the rule is too well settled to be now questioned, that the court must proceed according to the statute, omitting nothing essential, and one of the most important requirements is, that the party against whom the proceedings are had must have the notice prescribed by the statute.

But, notwithstanding the disclaimer of defendants in error, under the proceedings in 1846, a careful consideration of the whole record satisfies us, that the decree of 1849 was based on the alleged service of notice on the heirs in 1846.

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The proceedings originated in 1846, were in court, the order dismissing them having been set aside, and leave given to amend the petition, then and all the time pending in court. The amendment consisted in substituting for the land described in the petition, being the lands in Lake county, the lots in Chicago in lieu of those lands, and which are the lots in controversy.

It is hardly possible to suppose the court was not acting under the service of notice alleged to have been made in 1846, for, as the plaintiff's counsel argues, there was in 1849 no new adjudication upon the jurisdictional facts, either as regards subject matter or persons, but the decree proceeds at once to set aside the decree theretofore entered for the sale of the Lake county lands, and substitutes in lieu thereof the lots in controversy, and orders a sale thereof.

It must, we think, be held that the first decree in 1846 professed to find the jurisdictional facts, and upon that finding the decree passed. The result is, the recital of service under the petition of 1846 shows a defective service—not a service required by sec. 103. This, therefore, repels the presumption of jurisdiction which might arise, and for which defendant contends, in the absence of recitals. When leave was given to amend the petition, no new notice was ordered, and there is nothing in the record of the subsequent proceedings from which a new notice can be inferred. The decree, therefore, of 1849, must be presumed to have been made under the notice referred to in the decree of 1846, as it omits notice.

That the notice then and there appearing was defective, there can be no doubt, as it does not appear it was in conformity with the statute. The admission of the guardian *ad litem* that notice was given, could not bind the minors; he could admit nothing to their prejudice.

This brings the case within the decision in *Clark v. Thompson*, 47 Ill. 25, which was also an action of ejectment, one of the parties claiming under an administrator's sale.

The court say, the statute has provided but two modes by which the court can acquire jurisdiction of the persons of heirs in this proceeding; one is by publication of notice for the prescribed period, and the other by serving a notice with a copy of the petition and account of administration, upon the heirs, thirty days before filing the petition. In this case, neither of those modes appeared to have been adopted.

And in discussing the question of presumption, when a court of general jurisdiction has proceeded to adjudicate a cause, the court must presume the court had evidence there was such service or appearance as confers jurisdiction of the person; the question of jurisdiction being primary and first to be determined, we said was true in all collateral proceedings, but less liable to be rebutted.

If the record shows service which is insufficient, and the record fails to show the court found that it had jurisdiction, then the presumption is rebutted, and it must be held the court acted upon the insufficient notice; that when a summons and return appear in the record, and there is no finding of the court from which it may be inferred there was other service or appearance, it will be presumed the court acted upon the service which appears in the record. In that case, the summons and acknowledgment of service were considered insufficient to confer jurisdiction over the minors, and unless jurisdiction was otherwise obtained, the decree as to them was held to be a nullity, and might be attacked in a collateral proceeding. It has been long settled in this court that, in a proceeding to sell lands of a deceased person by his administrator, unless the mode pointed out by the statute for bringing the parties before the court is pursued, there will be such a want of jurisdiction as will vitiate the order of sale. *Herdman v. Short*, 18 Ill. 59; *Gibson v. Roll*, 27 ib. 92.

It may seem hard that innocent parties who have paid their money for these lots should lose them, but it is no less hard that an infant should be divested of his title, without notice of the proceedings so to divest him.

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We are of opinion, for the reasons given, that the decree should be reversed as to John Donlin, and the same is reversed and the injunction dissolved. Catharine Fitzgerald is out of the record, the plea of the statute of limitations having prevailed as against her.

The decree is reversed and the cause remanded.

Decree reversed.

THE ILLINOIS FIRE INSURANCE COMPANY

v.

MATTHEW STANTON.

1. **INSURANCE—mortgagor—mortgagee.** The mortgagor, as well as the mortgagee, has an insurable interest in the real estate insured. And when the mortgagor effects an insurance of the property, "loss, if any payable" to the mortgagee, the former holds the legal title, and when a loss occurs, the mortgagor may maintain an action on the policy in his own name for the use of the mortgagee; but as was held in the case of the *New England Fire and Marine Insurance Co. v. Wetmore*, 32 Ill. 231, an assignee of a policy can not sue in his own name.

2. **PROOF OF LOSS.** Where a party produces the policy in his name, and makes the proof of loss, he thereby makes a *prima facie* case entitling him to recover.

3. **SALE OF THE PROPERTY—without consent of company.** Where a plea averred that such a policy contained a condition that on the alienation or sale of the property insured, the insurance should cease and be void, unless the policy should be duly assigned or confirmed by the consent of the directors, previous to the loss, and no policy should be regarded as assigned, unless the consent of the directors be certified thereon by the secretary of the company, and it was averred that the mortgagor, to whom the policy was issued, sold the premises to another person without the consent of the directors, but the plea failed to aver that the sale was made before the loss occurred, and it failed to aver that the directors did not confirm the same: *Held*, the plea was bad on demurrer, as it is not essential to the validity of such assignment that consent shall be had before the sale, as it will be sufficient if had before the loss occurs.

Syllabus. Opinion of the Court.

4. **PLEADINGS—*declaration—plea.*** A bad plea can not be aided by reference to the declaration. A demurrer to a bad replication will be carried over it and sustained to a bad plea, as a demurrer is generally carried back and sustained to the first defect in the pleadings.

5. **NOTICE—to agents—its effect.** Where agents of an insurance company were applied to for consent to a conveyance of the insured property, and the policy contained such a condition as that set out in the plea, and they consented, and said the policy would be good until it could be received from another place, and the consent indorsed, and it appeared the agents had been in the habit of giving such consent, and the company had recognized its validity: *Held*, that the company must be bound by the consent of the agents thus given.

6. **FORFEITURE—*declaration of.*** A conveyance of the insured property, without the consent required by such a condition in a policy, would authorize the company to declare the policy forfeited; but as no steps were taken to declare it, and as the local agents gave their consent to the transfer of the property, the company is estopped from denying that they assented to the sale of the property.

7. **MUTUAL INSURANCE—and stock companies.** Where there is a provision in the charter of a mutual insurance company, that they may receive premiums in money and take risks in the same manner that is done by stock companies, and a person insures his property in the company and pays the premium in money, he can not be held to be a member of the company.

8. **POLICY—*condition in.*** Such a condition as that set out in the plea, in a policy, is inserted for the benefit of the company, and they can waive it like any other condition. And knowing that it has been violated, and permitting the other party to act on the supposition that they have assented to the act, and have waived the breach, prevents the company from retracting such consent.

APPEAL from the Circuit Court of Peoria county; the Hon. SABIN D. PUTERBAUGH, Judge, presiding.

Messrs. WEAD & JACK, for the appellant.

Messrs. McCULLOCH, MCCOY & STEVENS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of assumpsit, brought by the appellee in the Peoria circuit court, against the appellant, on a policy of

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insurance issued to Matthew Stanton, on a mill and distillery building, and the machinery and fixtures therein contained. The amount of the insurance was \$3,000, which was, by the terms of the policy, made payable, in case of loss, to John McClellan, who held a mortgage on the premises.

The action is brought in the name of Matthew Stanton, for the use of John H. Bobb, the assignee of the McClellan mortgage. The declaration sets forth the policy sued on, and the several conditions attached thereto, which are specially made a part of the contract of insurance, and avers performance of such several conditions. The defense sought to be interposed, is, that Matthew Stanton sold the insured premises without the consent of the company, and against the terms of the fifteenth condition of the policy.

The appellant filed five separate pleas, upon the four first of which, issue was joined. Without discussing at length the question raised on these four pleas, it is sufficient to say we think the issues were clearly with the appellee on the evidence. That the mortgagor and mortgagee have each a separate insurable interest, has long been held and recognized by all courts, and the law upon that question is too well settled to be now doubted. In this instance the interest only of the mortgagor was insured, but the policy contained a clause, that in case of loss, the money should be paid to McClellan, the mortgagee. The contract being with the mortgagor, the legal title vested in him, but it was for the benefit of the mortgagee. Hence, the suit was properly brought in the name of Matthew Stanton, the assured, for the use of the beneficiary.

In the *New England Fire and Marine Insurance Co. v. Wetmore*, 32 Ill. 221, it was held that the assignee could not bring a suit on a policy of insurance in his own name, unless authority was given for that purpose in the act incorporating the company. The rule is founded on the principle, that such instruments are not assignable at common law, or by any provision of our statute, so as to give the assignee the right of action in his own name.

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The appellee, by the production of the policy and the proofs of loss, made a *prima facie* case, entitling him to a recovery, and the question arises, do the facts stated in the fifth plea, as the same are therein pleaded, defeat the right of action? That plea alleges non-compliance with the fifteenth condition of the policy; that Matthew Stanton, by his deed, dated April 21, 1866, under his hand and seal, sold and conveyed the property insured, to Adam Stanton, without the company's consent, and in violation of the fifteenth condition of the policy declared on, whereby said policy ceased to be binding and became void. The fifteenth condition referred to, is as follows: "That in all cases, where real and personal property insured by said company shall become alienated, or shall be sold under execution or decree, or the title to the same shall in any manner be transferred or changed, or of any undivided interest therein, such insurance shall cease and be void, and said company shall not be liable for any loss and damage which may happen to any property after such alienation or change, as aforesaid, unless the policy issued thereon shall have been duly assigned or confirmed by the consent of the directors to the actual owner or owners thereof, previous to the loss and damage. And no policy issued by said company shall be deemed to have been duly assigned or confirmed, unless the consent of the directors to such assignment or confirmation is certified on such policy by the secretary of said company."

The plea was framed under this condition, and was intended to show a forfeiture of the policy by reason of the sale from Matthew Stanton to Adam Stanton, against the provisions of that stipulation. We do not think the plea is sufficient for that purpose; it does not aver the state of facts which, under that provision of the policy, would work a forfeiture. The plea is obnoxious to two objections; first, it is not averred that the conveyance made to Adam Stanton was made before the loss occurred; and second, it is not averred that the directors of the company, after the alienation, did not confirm the same to the actual owner previous to the loss. It is not indispensable

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that the assured should first have the consent of the company to make the sale of the property insured. It is sufficient if the policy issued thereon shall have been duly assigned or confirmed by the consent of the directors, to the actual owner or owners thereof, previous to the loss or damage.

Forfeitures are never regarded with favor by the courts. The party relying on the forfeiture of a contract, must plead every fact necessary to show the forfeiture insisted upon. It does not appear from any averment in the plea, that the alienation took place before the happening of the loss. This was a material averment, and without it the plea is substantially defective. It is averred that the sale of the property was made without the consent of the company, but it is not alleged that the alienation was not subsequently confirmed by the consent of the directors. In no view we have been able to take, does the plea state facts which, standing alone, are sufficient of themselves to show a forfeiture of the policy under the provisions of the fifteenth condition.

It is insisted by the counsel for the appellant, that the plea must be examined with reference to the declaration to which it purports to be an answer. It is averred in the declaration that the policy was made on November 22, 1865, and that the fire occurred on the 11th day of June, 1866. The averment in the plea is, that the premises were conveyed on the 21st day of April, 1866, and the appellee having traversed the allegations thereby presented, a material issue was thus formed. We do not see how a plea of this character is aided by a reference to the averments of the declaration. The appellee, however, did reply to the plea in substance: First, that he did not sell to Adam Stanton as alleged in the plea, upon which issue was joined; second, that at the time, etc., the appellant did consent to such sale and conveyance, and waived the assignment of the policy to Adam Stanton, and the confirmation and certifying the company's consent on the policy; and third, that the policy was taken for the benefit of McClellan, and that McClellan assigned the same to C. S. and J. H. Bobb, and that

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C. S. Bobb assigned the same to J. H. Bobb, all of which assignments were approved and consented to, and indorsed by the company on the policy.

The appellant interposed a demurrer to the last replication, which was overruled, and the decision of the court overruling the demurrer is now, among causes, assigned for error.

By the well settled principles of pleading, the demurrer would reach back to the first error in the pleadings, and the consequences of a defective pleading will rest upon the party committing the first error, and the appellant can not complain that a defective replication was allowed to stand to a defective plea. If the replication was bad, the plea is also bad, and both would fall together.

By the appellant's rejoinder to the second replication, and the appellee's sur-rejoinder thereto, the following issues were formed: First, did the appellant have any notice of the conveyance of the insured property to Adam Stanton, before the same was made? Second, did the defendant waive the assignment of the policy to Adam Stanton? And third, did the defendant consent to the sale and conveyance from Matthew to Adam Stanton?

Mainly upon these questions the parties seem to have tried the case in the court below. They were questions of fact, and the finding of the jury on the evidence was against the appellant on these several issues submitted to them.

It can not be doubted, in view of the evidence in the case, that the local agents of the company had notice of the conveyance of the property covered by the policy, from Matthew Stanton to Adam Stanton, at and before the date of the conveyance. The parties in interest, before the consummation of the sale, went to the local agents and told them they were about to make the transfer. Other policies on the property were changed by the same agents, in view of the sale, at the request of the parties in interest. The advice of the agents was asked as to the best course to be pursued with reference to this policy, and the parties were told it would be "good" until it could

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be procured from St. Louis, and the formal consent of the company entered on the policy itself. Before the policy was received, and any formal consent entered thereon, it appears from the evidence the property was destroyed by fire.

It is objected that the local agents had no authority to give the consent of the company, in this manner, to the sale of the property to Adam Stanton. It is in proof, that it had been the custom of the agents to give such consent, and their acts had always been ratified by the company. In giving such consent, the agents were therefore acting within the scope of their authority. Such agents will be held to have such power as the company knowingly permits them to exercise, and the fact that the company ratifies such acts on the part of their agents, will be regarded as evidence of that authority in the agents.

It is manifest from this whole evidence, that if the policy had been received from St. Louis before the loss occurred, the formal consent of the company to the sale would have been entered upon it in pursuance of the agreement with the local agents.

That the sale by Matthew Stanton to Adam Stanton, of the insured property, if not made according to the provisions of the fifteenth condition contained in the policy, would authorize the company to declare the policy forfeited, we entertain no doubt. It is the contract between the parties that such an act on the part of the assured would work a forfeiture. But the grave question in the case is, whether the appellant did not waive the forfeiture, or whether the company is not now, by the acts of its agents, estopped from denying that they assented to the alienation of the property to Adam Stanton.

In discussing this branch of the case, we are not inclined to attach much importance to the suggestion that this is a mutual company, and that the appellee is a member thereof. By section 1 of amendment to the charter, passed February 13, 1863, (Private Laws, p. 202,) it is provided that section 8 of the original charter be so amended, that "Any party applying for insurance, for one year or less time, may pay a definite sum of

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money for such insurance in lieu of a premium note." While it is true this company is organized on the mutual plan, this particular transaction does not seem to have any element of mutuality. In this instance, a sum certain was taken for the insurance effected on the property, and it does not appear, from anything in the record, that any premium note was ever given. It would seem, that a party insuring under this provision of the amended charter, does not become a member of the company, and stands in no different relation thereto than to any stock company. The policy sued on was undoubtedly issued under this provision. So far as the appellee is concerned, the appellant in this transaction was no more than a stock company, and he occupied no peculiar relation to it. The law, under such circumstances, would impose upon him no higher or greater duties than if the insurance had been effected in a stock company.

That the company's local agents were notified of the sale of the insured property to Adam Stanton, at the date of the transaction, does not admit of a doubt; and notice to the agents must be regarded as notice to the company. They were applied to for their advice and consent as to the sale, and freely gave it, and promised the parties the policy should be good until it could be obtained from St. Louis, and the proper indorsement entered thereon. Upon this distinct understanding the sale was completed, and the conveyance executed and delivered. Shall the company now be permitted to retract its consent, and insist upon a forfeiture under the strict provisions of the contract? Had no consent been given by the agents of the company when applied to for that purpose, it is more than probable the parties would have stopped their negotiations until the formal consent could have been obtained. But, relying on the faith of the promises of the agents of the company that the policy would remain "good," the parties were induced to complete the sale. If, for the doing of that which the company, by their agents, consented that the assured should do, it shall be held to be a forfeiture of the policy, it

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would be to permit the company to practice a fraud upon the assured, and thereby relieve themselves from the payment of the risk.

The property was transferred to Adam Stanton with the knowledge and consent of the agents of the appellant, and with the distinct agreement to keep the policy good until it should be brought in for the proper indorsement. The proof shows that all the parties acted in good faith, and relied implicitly on the agreement of the agents of the company. The company knew that the property covered by the policy had been thus transferred to Adam Stanton in ample time to have declared a forfeiture and cancel the policy before the happening of the loss. This, they had a perfect right to do. They did not choose to exercise this power, but rather chose to retain the appellee's money paid for the premium, and carry the risk, notwithstanding the property had been sold contrary to the terms and conditions of the policy. They deliberately elected, with a full knowledge of all the facts, to pursue this course, and ought to be held to such election.

The provisions of the fifteenth condition, that the policy should cease and be void in case of the alienation of the property, were inserted for the benefit and protection of the company, and no reason is perceived why the company may not waive that condition as well as any other restriction on the assured inserted in the contract for their benefit.

The cases are numerous where persons have been held to have waived provisions and conditions inserted in contracts, for their special benefit. Where such waiver distinctly appears, the reasonable rule of law is, that the party will be estopped from insisting upon that which is inconsistent with what he has said and done, and which affects the rights of others. It is in such cases that the doctrine of estoppels *in pais* finds its just application. The very object to be attained is to prevent injuries from acts and representations which have been acted on, if a party should be permitted to retract. This equitable rule was recognized by this court, in its application to insurance

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companies, in Wetmore's case, *supra*. The same doctrine has repeatedly been held by courts of the highest authority, to apply to mutual insurance companies, as well as to stock companies. *Peck v. New London Insurance Co.* 22 Conn. 575; *Sheldon v. Connecticut Life Insurance Co.* 25 Conn. 207; *Benton v. The American Mutual Life Insurance Co.* 25 Conn. 543; *Wing v. Harvey*, 27 Eng. Law and Eq. Reports, 140; *Buckbee v. U. S. Insurance, Annuity and Trust Co.* 18 Barb. 541; Ang. on Insurance, sec. 343.

The case seems to have been fully tried on its merits, and in view of all the evidence, we are of opinion that substantial justice has been done, and the judgment of the circuit court is accordingly affirmed.

Judgment affirmed.

Mr. JUSTICE WALKER dissents.

TRUSTEES OF THE FIRST EVANGELICAL CHURCH *et al.*

v.

MICHAEL WALSH *et al.*

1. JURISDICTION IN CHANCERY—*invasion of burial places*. Where certain town authorities, without right, invaded grounds purchased and appropriated by a church organization for the purposes of a cemetery, with the view to open a highway through the same: *Held*, such act of invasion was not merely a trespass for which there was such adequate remedy at law as to exclude the jurisdiction of a court of chancery, but that court had jurisdiction by injunction to restrain the commission of the wrong, and to quiet the parties entitled in the possession and use of their cemetery.

2. DEDICATION—*effect of a plat*. Where a tract of land of such character as not to be regarded as *urban* property, was laid out into lots of ten acres each, by the owner, who so platted the ground as to indicate that a certain strip was designed for use as a highway, but the plat was not in conformity with the statute, it was *held*, a dedication would not result from

57	363
128	63
57	363
141	106
57	363
166	171
57	363
184	210
184	215

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the mere making and recording of such a plat, but it would amount to nothing more than evidence tending to show a dedication, as at common law.

3. SAME—*estoppel in pais* And while the doctrine of estoppel *in pais* is not to be regarded as foreign to the principle upon which dedication rests, yet, where it did not appear that any of the lots had been sold with reference to the plat, which was of no statutory force of itself, or any improvements made with a view thereto, or any acceptance of the supposed highway by the public, there could be no estoppel to preclude the owner from denying there was a dedication.

4. When a dedication is relied upon to establish the right, the acts of both the donor and the public authorities should be unequivocal and satisfactory, of the design to dedicate, on the one part, and to accept and appropriate to public use, on the other.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

Mr. J. V. LE MOYNE, for the appellants.

Messrs. GOUDY & CHANDLER, for the appellees.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was a bill for an injunction to restrain appellees, officers of the town of Lake View, in Cook county, from interfering with appellants' possession and use of certain cemetery grounds therein situate.

On the 20th of April, A. D. 1860, appellants obtained, by purchase and deed, of and from one Humphreys, a conveyance to them, in fee, of the north half of the north half of the east half of the northwest quarter of section 20, town 40, north range 14, east of third principal meridian, excepting six acres on the southeast corner of the piece, previously sold, making fourteen acres conveyed. Appellants took possession, and

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soon after the conveyance inclosed the ground and devoted it to the uses of a cemetery, and have ever since continued such use of it. Afterwards, and on the 9th of October, A. D. 1865, they also purchased and obtained the conveyance of one Gilbert Hubbard, and wife, of a parcel of land constituting ten acres, and described in the deed as "All of block No. 4, of Laffin, Smith & Dyer's sub-division of the northeast quarter of section 20, town 40, north range 14, east of third principal meridian, with the appurtenances, &c."

The plat of Laffin, Smith & Dyer's sub-division of the northeast quarter of section 20, was introduced in evidence. It purports to have been acknowledged by the proprietors on the 24th, and recorded on the 27th of November, 1855; but it was not, nor is it claimed to have been, made in conformity with the statute as to the mode of laying out towns and making additions thereto. No statutory effect can, therefore, be accorded to the plat.

It appears by the evidence, that block 4 lies directly east of the first mentioned parcel purchased of Humphreys, and if a certain strip along the west line of block 4, designated on the plat as Gifford street, and forty feet wide, can not be regarded as a highway, then it adjoins the other parcel on the east.

Assuming they did join, appellants, soon after their purchase of the block, united both pieces into one by inclosing them with a suitable fence, and dedicated the whole ground to public use as a graveyard. Grounds thus devoted were regarded by the civil law as "sacred, religious and holy," and belong to no individual. Cooper's Justinian 69. And the civil law in this particular, is said by Bracton to be the common law, and it would be strange indeed that a system, based upon so accurate a theory of human nature as the common law is, should fail to recognize a sentiment so deeply seated in the human heart, and so universal in the human race, whether civilized or savage.

It appears that appellees, as commissioners and overseer of highways of the town, claiming the strip in question to be a public highway, Walsh, as overseer, and accompanied by a police officer, by the direction of the commissioners, just before the filing of this bill, proceeded, in the assertion of such claim, to take down, by force, the fence across the strip, both on the north and south sides of the inclosure, to effect an entrance into and through the grounds, while at the same time the solemn rites of burial were about to be performed within, and were thereby delayed for over an hour, and the clergyman officiating was threatened with arrest if any resistance was made; and now, without any disclaimer of the right asserted, appellees insist, that even if the right were ill-founded, the act was but a simple trespass, for which there is an adequate remedy at law, and chancery has no jurisdiction.

It has been decided by the Supreme Court of the United States, in a similar case, that there is no adequate remedy at law for such an invasion, and that chancery has jurisdiction. The right asserted in that case, went to the whole grounds; here, it is to a part only, but that does not affect the question. It is upon the principle that burying places, laid out and consecrated to such use, become public immunities, or common privileges, and if the right asserted would, when carried into effect, disturb the enjoyment of those immunities or privileges, and the right itself be ill-founded, then, as such disturbance would be more than a private trespass—would be a public nuisance going to the irreparable injury of the congregations complaining—chancery has jurisdiction to restrain its commission, and to quiet the appellants in the possession and use of their cemetery. *Beatty et al. v. Kurtz et al.* 2 Peters R. 566, 584; *Smith v. Bangs et al.* 15 Ill. 399.

What, we may ask, would be the measure of damages at law, for the wounded sensibilities of the living, in having the graves of kindred and loved ones blotted out and desecrated by common highway travel? The inadequacy of a remedy at law, is too apparent to admit of argument.

The only remaining question in the case is, whether the right asserted by appellees was well or ill-founded; or, in other words, whether the strip in question was, or was not, a public highway by dedication; for no other mode of its becoming so is pretended.

The dedication is sought to be established by the plat given in evidence; the act of cutting down some trees upon the strip by one commissioner, by direction of another, claimed to be an acceptance, and certain vague evidence of user by the public. First, then, as to the plat: We have already seen, this plat was not in conformity with the statute, and is to have no statutory effect given to it. Did it operate as a dedication, or is it only evidence tending to show it?

Angell, in his work on Highways, sec. 149, says: "It may be stated as a general rule, that when the owner of *urban* property, who has laid it off into lots, with streets, avenues and alleys intersecting the same, sells his lots with reference to a plat in which the same is so laid off, or where, there being a city map in which this land is so laid off, he adopts such map, by sales, with reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys, to the public."

This rule, we may say, is fully established by the American authorities, but this case does not fall within it. There is nothing to show that the land included in the sub-division was urban property. A sub-division into ten-acre blocks may be consistent with the idea of urban property, but does not, of itself, prove the property to be of that character. If it had been, the fact could have been easily shown; but it does appear that the Humphreys property was used as a farm.

There is not a word of proof in the case, that any of the property embraced in the plat introduced in evidence, has ever been sold by Laffin, Smith & Dyer, or either of them, or by any grantees of theirs, with reference, in terms, to this plat. It does not appear that Hubbard, appellants' grantor, derived his title from Laffin, Smith & Dyer, or either of them.

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The basis of the rule from Angell, is the doctrine of estoppel either by deed or *in pais*. When a vendor, who has so platted his land, makes reference to such plat in his deed, or reference to the plat of a city made by commissioners, the plat becomes a part of the deed. As was said in *Wyman v. Mayor, etc.*, 11 Wend. 486, where the owner sold city lots with reference to a map on which the streets were laid down, "he adopts the map, and thereby makes an appropriation or dedication, to public use, of the ground laid out as streets." So in *Livingston v. Mayor, etc.*, 8 Wend. 85; *Trustees of Watertown v. Cowan*, 4 Paige, 510. Hence, also, it was said by Bronson J., in matter of *Thirty-second street*, 19 Wend. 130, that in such cases "it was a matter of no importance whether the street, so designated by reference to the city map, had ever been opened, or used as such or not."

But in Hubbard's deed to appellants, there is no reference in terms to the plat introduced in evidence, as in the cases referred to. In the cases of *Noonan v. Lee*, 2 Black (U.S.) 499, *Thomas et al. v. Hatch*, 3 Sumner, 170, and *Glover v. Shields*, 32 Barb. 374, there was an express reference in the deed to the plat, plan or survey.

It may be that parol evidence, not inconsistent with the written instrument, would be admissible to apply such instrument to its subject, as was held in *Noonan v. Lee*, *supra*. But as none was attempted to be given, it is unnecessary to express any opinion as to its admissibility or effect.

There is also a total absence of evidence in this case, tending to show that the plan introduced in evidence had ever been regarded in respect to improvements, or that any such had ever been made upon or near the land, or that other lots have ever been sold with reference to the plat.

The doctrine of estoppel *in pais* is frequently applied in this country, although Mr. Angell thinks it is foreign to the principle on which dedication rests, and forms an excrescence to mar the simplicity of the doctrine as established by English authority. Nevertheless, it was applied in the leading case of

City of Cincinnati v. White's Lessees, 6 Peters, 438. The court say: "The right of the public to the use of the common in Cincinnati, must rest upon the same principle as the right to use the streets; and no one will contend that the original owners, after having laid out streets and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public;" * * "and after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

It would seem that the doctrine of estoppel is, after all, not foreign to the principle upon which dedication rests. The making of the map, or plan, and selling building lots thereon, and keeping silent while improvements are made, are the clearest evidence of an intention on the part of the owner to donate the land thus designated, to public use, and purchasing the lots sold in this manner, and making the improvements, or, if it be a street, working and repairing it by the public authorities, or a user by the public a sufficient time, constitute evidence of acceptance of the proffered donation, which, if unequivocal, makes the dedication complete; and the reasons that underlie an estoppel *in pais* are cogent against allowing the owner to revoke the dedication.

In *Godfrey v. The City of Alton*, 12 Ill. 33, dedication was adjudged upon a survey and plan, which were adhered to in selling lots and making improvements, and the doctrine of estoppel *in pais* was not expressly referred to. But in *Child v. Chappell*, 5 Seld. R. 256, Denio J. says: "In the case of an express dedication, it is not necessary that it should be followed by any length of user. *Hunter v. The Trustees of Sandy Hill*, 6 Hill, 413, 414. It operates immediately in the nature of an estoppel, upon the principle that to retract the

promise implied by such conduct, and upon which the purchaser acted, would disappoint his just expectations." In that case, the question was one of private right between individuals.

This case is not one of express dedication, nor does it contain any element of estoppel within any of the authorities. The plat was not in conformity with the statute, so that making and recording it would amount to nothing more than evidence tending to show a dedication, as at common law. Ang. on Highways, sec. 149, p. 161-2, and cases referred to in note.

Secondly, was there an acceptance by the public authorities? Dyer, one of the proprietors who made the plat, was put upon the stand by appellees and interrogated as to their intentions in reference to this strip. He testified it was 33 feet wide, and they expected the owner of adjoining land would join in making it a street; that they intended to leave 33 feet, or leave a chance for a street, if anybody would join. This intention is apparent from the plat itself. The other streets designated upon it are marked 80 feet wide, while this is only 40. But nobody would join. He was the principal man in making the plat, lived near by, and was familiar with all that was done. He testifies he never knew any work to be done on this strip by the public authorities, or that it was used by the public as a highway. The evidence is overwhelming, that down to the time appellants inclosed this block with their other ground, and cleared and appropriated it to cemetery purposes, this strip was covered with wild crab-apple brush, small and large oaks, and, for years before appellants purchased, there was a fence across the strip, a short distance south of the south line of the block; that it was never worked or repaired as a highway by the town authorities, and never used by the public, except occasionally by picking a way through.

The deposition of one Jacob Wolfe, was taken in May, 1868, and he testifies, that about seven years before that time, he cut down some trees on this strip; that, at the time, he was commissioner of highways; that he did it by the direction of

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Dr. Dyer, who was also a commissioner. This is relied upon as evidence of an acceptance by the public. But what detracts from the force of the evidence, is, that Dyer was one of the owners of the property at this time, and it is therefore doubtful whether the direction was given as owner, or merely in the character of a town officer. It was not done in a way to give it either the appearance or force of an official act. Besides, Dyer testifies that he never knew any work to be done upon it as a highway, and Wolfe says he took what he cut, home, for firewood.

The act, if it could in any point of view amount to an acceptance, is altogether too equivocal to have any such effect given to it.

In *Grube v. Nichols*, 36 Ill. 96, this court said: "When a dedication is relied upon to establish the right, the acts of both the donor and of the public authorities should be unequivocal and satisfactory, of the design to dedicate, on the one part, and to accept and appropriate to public use, on the other."

Upon a very careful examination of the evidence, we are satisfied that all the material allegations of the bill are sustained. The decree of the court below dismissing the bill, must therefore be reversed and the cause remanded.

Decree reversed.

ELEANOR STRIBLING *et al.*

v.

BENJAMIN S. PRETTYMAN.

1. EJECTMENT—*letting in third persons to defend.* In an action of ejectment, after judgment rendered against the defendant in possession, upon motion based on affidavit at a subsequent term other parties were permitted to defend: *Held*, the affidavit, it appearing from the statements therein

57	371
134	71
57	371
67a	79

57	371
92a	235

57	371
201	1482

Syllabus.

that the title claimed by the applicants was consistent with the possession, and that there was a privity of interest between them and the original defendant, was sufficient to justify the action of the court in vacating the judgment and permitting the applicants to defend—it was not necessary that an exhibit of their title should accompany the affidavit.

2. **CONSTRUCTION OF STATUTES—general rules.** In the construction of statutes, the intention of the legislature is always a proper subject of inquiry. The intention is to be ascertained from the act itself and other acts in *pari materia*—all acts in *pari materia* are to be taken together as if they were one law—and this rule prevails even though some of the acts may have expired or been repealed.

3. **EXECUTION—within what time it may issue.** Upon a judgment obtained in a court of record execution may issue against the judgment debtor if one was issued within a year and a day, and its collection be enforced against the real estate of the debtor except “as against *bona fide* purchasers and subsequent incumbrancers, etc.,” after the expiration of seven years, and at any time within twenty years. *

4. **WALKER and SCOTT, JUSTICES,** hold that execution can not lawfully issue after the expiration of seven years, except upon a *scire facias* to revive the judgment.

5. **SHERIFF'S DEED—insufficiency of return of sale—its effect.** In an action of ejectment, where the plaintiff claimed under a sheriff's sale, an objection that the sheriff's return upon the execution failed to show a sale, was overruled. It was only necessary for the plaintiff to produce the judgment and execution, to entitle his deed to be read in evidence. His title could not be defeated by the neglect of the sheriff to make a proper return.

6. **INSTRUCTIONS—whether proper.** In an action of ejectment, where a register's certificate of purchase was given in evidence, it was held proper to instruct the jury that the certificate was evidence of title in the person to whom it was issued, and that a judgment and execution against such person, together with a sheriff's deed thereunder, conveyed the title to the grantee therein. While instructions should not assume the existence of facts, still it is proper for the court to direct the jury as to the legal effect of the evidence admitted.

7. **ESTOPPEL—admissions.** The admission in open court by the defendant in ejectment, that the plaintiff had title at the time of the commencement of the suit, operates as an estoppel, and it is the province of the court so to direct the jury.

WRIT OF ERROR to the Circuit Court of Tazewell county ;
the Hon. JAMES HARRIOTT, Judge, presiding.

* See act 22 March, 1872, Sess. Laws, p. 506, sec. 6.

Opinion of the Court.

Mr. C. A. ROBERTS and Mr. N. W. GREEN, for the plaintiffs in error.

Messrs. PRETTYMAN & WARE, for the defendant in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This was an action in ejectment, instituted by Prettyman against Casey, to recover the possession of certain premises. By agreement, the heirs of Jacob Haas were permitted to defend.

At the February term, 1865, of the circuit court, a trial was had before the court, without a jury, and there was a finding in favor of defendant in error.

At the February term, 1866, plaintiffs in error were, upon motion based on affidavit, allowed to come in and defend.

Defendant in error questions this action of the court below, and insists that, in addition to the affidavit, at least a *prima facie* case should have been made out, by the exhibition of some title in the ancestor of plaintiffs in error. The affidavit of Rhodes, upon which the motion was founded, stated that Casey, the original defendant, and occupant of the premises, was the tenant of the guardian or administrator of Jacob Haas, deceased, whose heirs, by agreement, were made parties prior to the first trial; that Haas claimed title by deed from one Reisinger; that Reisinger derived title by deed, with covenants of warranty, from David C. Alexander, the ancestor of plaintiffs in error; and that he, in his life-time, had a perfect title to the land.

The rule, briefly stated in all the books, is, that in ejectment every person is considered as a landlord, entitling him to defend, whose title is connected to and consistent with the possession of the occupier. *Williams v. Brunton*, 3 Gilm. 600; *Stiles' ads. Jackson*, 1 Wend. 316; *Adams on Ejectment*, 230.

It is apparent, from the statements in the affidavit, that the title claimed by plaintiffs in error was clearly consistent with

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the possession. There was certainly a privity of interest between the applicants and the original defendant. They had an interest, as the matter was presented to the court. True, they wholly failed, on the trial, to prove the alleged interest. They exhibited no deed either to their father or from him to Reisinger. The affidavit, however, was sufficient to justify the action of the court in the vacation of the judgment and permitting plaintiffs in error to defend. We can perceive no good reason for requiring an exhibit of title to accompany the affidavit. It would be a harsh and stringent rule, and might work great injustice. The policy of the law is, to afford all reasonable facilities to parties to obtain and protect their rights.

On the second trial, defendant in error again recovered a judgment.

The first error assigned for reversal is, that the sheriff's deed should not have been read to the jury. The judgment upon which the execution was issued, and by virtue of which the sheriff sold, was rendered April 17, 1838. Execution was issued and returned within the year after the date of the judgment. The execution by which the sale was made, was issued and dated the 25th of December, 1857. It is argued that the judgment, at the latter date, was a nullity; and that no execution could properly issue after the lapse of seven years.

The evidence of title was the following:

Certificate of the register of the land office to Spencer Field, of date November 28, 1836; judgment against Field, April 19, 1838; execution issued thereon April 19, 1838; fifth execution dated 25th December, 1857; sale of land, and deed from sheriff to defendant in error.

The following is the first section of the chapter of the statutes entitled "Judgments and executions:" "All and singular the goods and chattels, lands, tenements and real estate of every person, against whom any judgment has been or hereafter shall be obtained in any court of record, either at law or in equity, for any debt, damages, costs or other sum of money, shall be liable to be sold on execution, to be issued on such

judgment; and the said judgment shall be a lien on such lands, tenements and real estate, from the last day of the term of the court in which the same may be rendered, for the period of seven years: *Provided*, that execution be issued at any time within one year on such judgment; and from and after the said seven years, the same shall cease to be a lien on any real estate, as against *bona fide* purchasers, or subsequent incumbrancers by mortgage, judgment or otherwise."

Our statute of limitations provides that judgments may be revived by *scire facias*, or an action of debt may be brought upon them within twenty years after their rendition, and not after.

In determining the construction of those statutes, and the intention of the legislature, we are aided much by reference to previous legislation. During our territorial existence, real estate was authorized to be seized and sold, upon judgment and execution obtained, as early as August 15, 1795. (See Real Estate Statutes by Purple, 294, *et seq.*) Various enactments were made, between 1795 and 1823, subjecting real estate to sale, and making judgments a lien on the same, without any limitation or any exception in favor of *bona fide* purchasers or subsequent incumbrancers, after the lapse of seven years.

The present statute was in force May 1, 1825. At that time the limitation law, barring the revivor of judgments after twenty years, had not been passed. This latter law was not in force until June 1, 1827.

It will thus be seen that by all the legislation in the territory and State, until 1825, lands were subject to sale without any restriction in the statute, or any protection of the rights of third persons, as now provided.

In the construction of statutes, the intention of the legislature is always a proper subject of inquiry. The intention is to be ascertained from the act itself, and other acts in *pari materia*. Lord MANSFIELD said: "All acts in *pari materia* are to be taken together, as if they were one law." This rule prevails, even though some of them may have expired or been repealed.

What was the object of the legislation, antecedent to 1825? It was unquestionably to give a lien on the judgment debtor's lands, without any saving as to purchases by third persons. There was no bar to the lien, except according to the common law.

What was the object of the law of 1825? What mischief did it design to remedy? It was to remove the embarrassment upon the transfer of real estate, which existed prior to 1825; and to prevent any interference with subsequent purchasers, after the expiration of seven years from the date of the judgment. The judgment is not barred until after twenty years. It only ceases to be a lien after seven years, upon property then acquired by innocent purchasers or subsequent incumbrancers. The judgment debtor is not released, and an execution may issue against him at any time within twenty years, if one had been issued within one year after the judgment.

Stripped of much verbiage, the plain reading of the statute is: The real estate of a judgment debtor, if execution issued on the judgment within the year, may be levied upon and sold within the time limited by statute for its revivor by *scire facias* or action of debt; except that it shall cease to be a lien as against *bona fide* purchasers or subsequent incumbrancers, by mortgage, judgment or otherwise, after the expiration of seven years from its rendition.

The construction of the limitation law is, that a judgment may be revived at any time within twenty years from its rendition, if no execution has been issued within a year and a day. It should not be construed to mean that it must be revived after the expiration of seven years, if execution was issued within the year and a day. In construing the two statutes together, the evident meaning is, that the judgment is of binding force for twenty years, provided the statute is complied with; and its collection can be enforced, except as against *bona fide* purchasers, etc.

Dissenting opinion of JUSTICES WALKER and SCOTT.

Plaintiffs in error object to the return of the sheriff upon the execution, as not showing a sale, and refer to *Douglas v. Whiting*, 28 Ill. 362. The case is not in point. In that case the execution did not contain the name of any person, and for that reason was pronounced defective. Defendant in error claimed title under a sheriff's sale. He need only produce the judgment and execution, to entitle the deed to be admitted. A title can not be defeated by the neglect of the sheriff to make a proper return. *Hinman v. Pope*, 1 Gilm. 131 ; *Bybee v. Ashbee*, 2 Gilm. 151.

After the commencement of this suit, defendant in error conveyed the premises to Haas' heirs. This deed is introduced by plaintiffs in error, and they seem to rely on it, and show no title in themselves; no possessory right or interest of any kind in their ancestor; no liability upon his covenants; and are not entitled to much indulgence from the court.

Complaint is made that the court instructed the jury that the register's certificate was evidence of title in Field; and, that the judgment, execution and deed from the sheriff conveyed title to defendant in error; and that the admission, in open court, that defendant in error had title, is an estoppel on the part of plaintiffs in error.

In this there is no error. It is true, instructions should not assume facts, which must be found by the jury. The documentary evidence had been passed upon, and admitted by the court. The jury must be informed by the court, as to the legal effect of such evidence. The admission, of the title of the defendant in error, at the time of the commencement of the suit, was an estoppel, and the court had the right so to declare.

The judgment is affirmed.

Judgment affirmed.

WALKER, JUSTICE: I am unable to concur in the conclusion announced by the majority of the court in this case. In the case of *Dooley v. Rucker*, 49 Ill. 377, it was held that a purchaser at

an execution sale must present his certificate of purchase to the sheriff for a deed, in a reasonable time, which was held to be the same length of time, after the redemption had expired, that the judgment is a lien on real estate. It was there held that the analogies of the law should be applied, and that they required the deed to be executed within seven years after the redemption had expired, and if not made within that time, that a deed could only be made by the sheriff on an order of the court in which the judgment was rendered. That case is placed upon the presumption that the judgment debtor had adjusted the purchase and failed to take up the certificate.

If such is the inference from the statute rendering the judgment a lien for only seven years, so as to raise, as between the debtor and creditor, the presumption that the sale had been cancelled by arrangement between them, why should not the presumption be indulged after seven years from the date of the judgment, that it had been paid, but a satisfaction had been neglected. And why should not the plaintiff, for the same reason, be required to apply to the court by *scire facias* for an order for an execution. I am, therefore, clearly of opinion that the case of *Dooley v. Rucker*, *supra*, should govern the case at bar.

SCOTT, JUSTICE: I concur in the views expressed by Mr. JUSTICE WALKER.

57	378
27a	398
57	378
37a	602

EDWARD C. MURRAY *et al.*

v.

JANE McLEAN, Administratrix.

1. NEGLIGENCE—*degree of care required to prevent injury to others upon one's own premises.* The occupant of a building is not bound to insure the

Syllabus.

safety of persons who may come upon the premises. He is held to the use, not of the utmost, but only reasonable care and caution under the circumstances, to prevent others from receiving harm.

2. In an action under the statute to recover for the death of a person, occasioned by the alleged negligence of the defendants, it appeared the defendants were large tobacco manufacturers, and in the building occupied by them, hogsheads of tobacco and other heavy material were carried from the first floor to the different floors above, by means of an elevator running through hatchways cut in each floor. These hatchways were situated some distance back from the front of the building, away from the office and out of the reach of persons having business to transact with the house, where no one except the inmates of the house and employees could be reasonably expected to go, and were surrounded, except when the elevator was in use, by railing from three to four feet high. The building was considered very good as to light, and in the basement, from four to six feet from the hatchway in the first floor, a gas jet was kept constantly burning. At the time of the accident, between nine and ten o'clock in the morning, the elevator was in use, carrying hogsheads of tobacco from the first to the fourth floor. Two men were engaged at the work. They would roll a hogshead on the elevator, get on with it, ride to the fourth floor, unload and descend. While the elevator was thus in use, the deceased fell through the hatchway in the first floor, receiving injuries from which he died. It appeared the deceased, who was a cooper, furnished the defendants with kegs for packing purposes, and was in the habit of bringing them in a wagon to the front door of the building to unload. The first that was known of him about the building on the morning of the accident, was from his cries in the cellar just under the hatchway, while the elevator was at the fourth story with a hogshead of tobacco. Immediately afterward his wagon was found at the door, with a load of kegs upon it. Keeping the mouth of the hatchway unguarded while the elevator was thus in use, was the only negligence imputable to the defendants: *Held*, while the defendants might have prevented the injury by the employment of an additional force, so as to have kept a guard stationed at the hatchway for the express purpose of protecting persons from injury by falling into it, the law imposed no such burden upon men's conduct of their ordinary private business upon their own premises.

3. But had the hatchway been at a place where persons were accustomed to pass and repass, or to be about, and their presence there ought to have been reasonably anticipated, a higher degree of care might have been exacted of the defendants.

4. EVIDENCE—*credibility of witnesses when in the employment of the party for whom they are called.* The mere fact that witnesses are in the employment of the party for whom they are called, will not justify the jury in discrediting them to the extent of rejecting their testimony entirely.

Syllabus. Opinion of the Court.

5. **ABSTRACTS—costs.** In this case the appellants printed the entire testimony, which was very voluminous, and not being in compliance with the rule in respect to abstracts, the costs of the so-called abstract were taxed against the appellants, although the judgment was reversed.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. MOORE & CAULFIELD, for the appellants.

Messrs. HERVEY, ANTHONY & GALT, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The testimony in this case shows the defendants, Murray & Mason, were large tobacco manufacturers, occupying for that purpose the two buildings being Nos. 174 and 176 North Water street, in the city of Chicago. These two buildings so communicated with each other by means of archways as to be used as one. The houses were four stories high, with a cellar, and fronted to the north. Hogsheads of tobacco and heavy material were carried from the first floor to the different floors above, by means of an elevator running through hatchways cut in each floor. This elevator operated in one of the buildings, to-wit, 174, the west building, up and down the west side of the wall dividing the two houses. It was communicated with from the east building by means of arches cut in the dividing wall (or No. 176;) each of these hatchways was surrounded by rails from three to four feet high, as we think the proof shows. The hatchway on the first floor (above the cellar) was so surrounded in No. 174, and in 176 it was protected by a sliding bar across the mouth of the hatchway. On the second floor the hatchway was similarly protected. These two floors are the only floors in controversy in this case. The testimony shows, that the floor of 176 extends the thickness of the dividing wall through the opening to the elevator, and that the hatchway does not extend from 174 to the east side of the

dividing wall. Therefore, the whole opening of the hatchway is in the floor of 174.

The testimony shows, that on the morning of the 15th day of April, 1869, the elevator was in actual use, carrying hogsheds of tobacco from the first to the fourth floor; that the hogsheds were around the archway on the first floor in 176; that two men were engaged at the work; that the bar across the mouth of the hatchway was drawn aside; that the two men would roll a hogshed on the elevator, get on with it, ride up to the fourth floor, take off the hogshed and descend again to the first; that the time occupied in going up and returning was about two or three minutes.

The deceased was a cooper, carrying on his trade in Chicago. Among others, he furnished Murray & Mason, the defendants, with kegs, etc., for packing purposes. He was in the habit of bringing the kegs in a wagon to the front door. Just after the accident, his wagon was found at the door with a load of kegs upon it. The deceased had not shown himself to any one in the office, and was not seen about the building prior to his fall. The first that was known of him in the building at all was from his cries in the cellar just under the hatchway, while the elevator was at the fourth floor going up and down with a hogshed of tobacco. He was immediately taken by Mr. Mason, one of the firm, and other inmates of the house, from the cellar up to the first floor by the back stairway, and seated on a box in front of the hatchway. Mr. Mason there asked him how he happened to be there; he replied, "he did not know what took him there; that he had no business there at all;" saying, "I knew where the hatchway was just as well as you gentlemen do." He was then taken into the front office and cared for. While there, he several times reiterated the foregoing remarks. After all was done for him that could be done in the office of Murray & Mason, he was taken in a carriage to his home, and a physician sent by Murray & Mason immediately to his home to dress his wounds. The deceased's family, however, had sent for another physician, and both united in their attention and

services to the wounded man. The evidence of both physicians is, that when they left him there was no apparent danger of death whatever. The physician sent by Murray & Mason, never saw him after the first visit, as he was told his services would not be needed. McLean, however, died within the next two or three weeks. This suit is brought under the statute, by his wife as administratrix, to recover damages, &c., of Murray & Mason, in whose house the accident occurred.

On the trial of the case, the jury rendered a verdict against the appellants for \$5,000.

A motion was made for a new trial, and overruled.

The appellants insist this verdict is contrary to the evidence and the law of the case.

After a careful examination of all the evidence in the case, we can find no culpable neglect on the part of the appellants.

The deceased stated, immediately after he was brought up from the cellar where he was found, that he fell from the first floor, as testified to by two witnesses. The sliding bar across the mouth of the hatchway, which protected it on the first floor, was removed to enable the men to get the hogsheads of tobacco on the elevator which they were engaged in using, in hoisting the hogsheads from the first floor up on to the fourth floor. Having, and leaving, this bar drawn, while engaged in that work, is really all the negligence imputable to the appellants.

It is true, the appellants might have prevented this injury by the employment of an additional force, so as to have kept a guard by keeping a man stationed at the hatchway, for the express purpose of protecting other persons from injury; but the law imposes no such burden upon men's conduct of their ordinary private business upon their own premises. The occupant of a building is not held bound to insure the safety of persons who may come upon the premises. He is held to the use, not of the utmost, but only of reasonable care and caution, under the circumstances, to prevent others from receiving harm.

Opinion of the Court.

This hatchway was located some sixty-five or seventy feet back from the front of the building, where were situated the office and room, where others having business with the house transacted it; and was at a place where no one, except the inmates and employees of the house, had any business, and could not reasonably have been expected to be there, exposed to danger. Had the hatchway been at a place where persons were accustomed to pass and repass, or to be about, and their presence there ought to have been reasonably anticipated, a higher degree of care might have been exacted of the appellants.

We fail to discover from the evidence any want of ordinary care, a reasonable regard for the safety of others, and prudence, on the part of the appellants in their use and protection against danger, of this elevator and hatchway.

But the theory is advanced, that the deceased fell from the second floor, the evidence in support of which is claimed to be an appearance of injury about the waist, indicating the body had struck against some hard object in the fall, and which must have been the edge of the hatchway in the first floor, in falling from the second floor.

Opposed to this, is the probability that more extensive marks of injury would have been exhibited, had the fall been from the second floor; the possibility of striking upon the opposite side of the hatchway, even had the fall been from the first floor—the statement of the deceased himself, testified to by two witnesses, that he did fall from the first floor, and the fact testified to by a witness who saw it but a few minutes after the injury, that the protection was up around the hatchway on the second floor—the elevator was not being used from that floor. And had the fall been from the second floor, the evidence discloses no negligence, but on the contrary, care, in having the hatchway on that floor protected.

And while we fail to find any culpable negligence on the part of the appellants, was the deceased, himself, in the exercise of due care and caution at the time of receiving the injury? It does not appear the deceased had any proper business near

the hatchway. From the fact of his wagon being found standing loaded with kegs in front, it is supposed by the appellee he must have been in search of some one to assist him to unload, or of Burke, to get orders for the next day's packages.

There seems to have been no necessity to have assistance to unload. The receiving clerk, who attended to receiving and giving receipts for the kegs, testifies, that when not busy he frequently assisted in unloading, taking the kegs as they were tossed from the wagon, and that it was an accommodation to him, saving him one handling of them; but that the deceased oftener unloaded without, than with any assistance. This clerk was at his place in the office in front of the building, as were others, but they saw nothing of the deceased that morning until after the injury. But if in search of assistance, he had passed by the door of the office in front, and was passing along back in the shipping room in 176, towards the hatchway; he could not have stepped into the hatchway without going entirely outside of that room, a distance of the thickness of the partition wall. The opening in the wall there, was not used for passing from one building to the other over the elevator, when it was down, because it was surrounded on all sides by a railing.

If the deceased had been in quest of Burke, the usual and direct way was up the front stairs, from the shipping room to the second floor, then along south to the first archway, which communicated with Burke's room, and which was not so far south as the hatchway on the second floor.

The appellee's theory is, that the deceased passed by the front steps in the shipping room, which led up to Burke's room, along in the shipping room south some seventy-five feet, and past the hatchway to a back pair of stairs which led up to the second floor; that he went up those stairs on to the second floor, and then went back north on that floor to go to Burke's room, and walked through the first archway into the hatchway, by mistake for the next archway further on, which

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communicated with Burke's room. This could not be considered the proper way to approach Burke's room, from the front of the building.

We have the statements of the deceased, that he had no business at the hatchway, and did not know what took him there.

The building is described as being very good as to light, and that it was so around this hatchway; a gas light was kept constantly in the basement underneath the hatchway, four to six feet from it, the flame of which was visible on approaching the hatchway from the front part of the buildings. The accident took place between nine and ten o'clock in the morning. Walking into and falling through this hatchway, under all these circumstances, is not reconcilable with the exercise of due care and caution on the part of the deceased, by the testimony in this case.

But it is urged that the testimony of the appellant's witnesses, as to the statements of the deceased, is unworthy of belief; that he was suffering from pain, and in agony, at the time they were made. The proof does not show his bodily or mental condition to have been such as to diminish, essentially, the credence to be given to whatever statements he did make. It is said they were improbable. They certainly were not so much so as to overcome the testimony of four unimpeached witnesses that they were made—the statements as to the hatchway.

Again, it is objected to them, as well as the rest of the witnesses for the appellants, that they were in the employment of the appellants. One of the two witnesses who testified to the statement of falling from the first floor, was not in their employ at the time of the trial. But the fact of being in such employment, would not justify the jury in discrediting them to the extent of rejecting their testimony entirely. *Chicago & Alton Railroad Co. v. Gretzner*, 46 Ill. 80.

The appellants' testimony is not to be done away with by these objections.

25—57TH ILL.

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We feel no hesitation in saying, that the verdict in this case is clearly against the evidence. The judgment must be reversed and the cause remanded.

The appellants in this case have filed no abstract of the record, but have printed the whole testimony entire, as it was given, which is not in compliance with the rule. It is a great tax upon the time of the Court to search through such a voluminous mass of testimony, to find the material facts in the case. The costs of the so called abstract will be taxed against appellants.

Judgment reversed.

JOSEPH STOUT *et al.*

v.

ISAAC COOK.

1. **IMPROVEMENTS**—*of allowance therefor, on setting aside the title of the party claiming them.* In a suit in chancery to set aside a sheriff's deed, a decree being rendered granting the relief sought, and an account of rents and profits taken against the defendant, upon objection that the court erred in not allowing the defendant for the improvements placed upon the land, it was *held*, the improvements having been made by a tenant of the defendant, the latter paying nothing therefor and incurring no liability on account of them, the charge was properly denied. The defendant was only entitled to allowance for the necessary improvements put upon the land, for which he had paid or was liable to pay.

2. **EVIDENCE**—*whether admissible.* Although an attorney's minutes are not competent to supply the place of a lost deposition, and the witness being alive it is not admissible to prove by others what he testified to in his deposition, it does not follow because the attorney's notes are not admissible as evidence that exhibits referred to in his notes would not be competent evidence on a subsequent trial, or that the attorney could not testify to the contents of lost exhibits, or refer to his notes for the purpose of refreshing his memory as in any other case.

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APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. D. B. SNOW and Mr. E. W. EVANS, for the appellants.

Mr. H. A. WHITE and W. T. BURGESS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a bill in chancery, filed by appellee in the year 1859, against appellants, to set aside a sheriff's deed. On a final hearing the relief prayed was granted, and an account of rents and profits taken, and the case brought to this court, and the decree reversed; and a further account was taken in the court below, a decree rendered for the payment of the same, and an appeal taken from that decree. The assignment of errors upon the record questions the sufficiency of the evidence to sustain the decree.

We, after a careful examination of the record, fail to find that the errors are well assigned. It appears that the evidence as to the value of the coal removed varied from a half of one to two and a-half cents per bushel, and the court seems to have allowed two cents. We think the evidence preponderates in favor of that rather than a lower price. In fixing it at that value the court below was fully sustained by the evidence. In this we perceive no error, nor do we see that the court below allowed too large a sum for interest on the sum received for coal and other items. As a practical question, it would be impossible to ascertain the true date and amount received at the several payments for coal made by the persons who raised and removed it, so as to compute interest from the precise date. And when the time is averaged and interest thus computed, it fully reaches, if it does not exceed, the amount of interest allowed by the court.

As to the rents for the use of the place, there seems to be no difficulty, as the proof shows for what years the premises

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were let to the different occupants, and the amount paid. And it appears that the court allowed no more than the proper amount of interest on the sums thus received. In allowing this item with interest, there was no error.

It is urged that the court below erred in refusing to allow for improvements put upon the land. The evidence shows that they were placed on the land by Collisson, who received no pay from appellants for making them, so far as this record discloses. On the contrary, he sold them to McDonald, when he left. And the latter swears appellants never paid him for them. On this proof we see no grounds for allowing this charge in appellants' account. They should only be allowed for necessary improvements made by them for which they have paid or are liable to pay. If they have cost appellants nothing, and they are liable for nothing on account of their having been made, then upon what principle of justice can they claim pay for them? It would be receiving something for nothing, and for that they have no right. Suppose they had entered upon appellee's place, with the improvements, leased it, and received the rents, and when required to account for the rents, would any one suppose they would have any claim for the improvements thus found on the land? We presume not; and why? because they cost them nothing. And, in principle, in what consists a difference between that and the case at bar? We are unable to perceive any, if it exists. We are, therefore, of opinion that there was no error in rejecting this item.

Objections are urged as to the admission of a portion of the evidence heard below. We are unable to find any irregularity in it, on the grounds urged. On the former hearing in this court, we held that the attorney's minutes were not competent to supply the place of the lost deposition, and that, the witness being alive, it was not admissible to prove by others what he had testified to in his deposition. In such cases the regular course is to retake his deposition, as though he had never been examined, and not to prove what his lost deposition contained. But because the attorney's notes of the deposition were not

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admissible, it does not follow that exhibits referred to in the notes would be illegal evidence on a future trial. Nor would it follow that because such notes were not evidence, the attorney could not prove the contents of lost exhibits, on a future trial, or that he would be precluded from referring to his notes for the purpose of refreshing his memory, as in any other case. And, as we understand it, this is the objection, and in it we perceive no force.

A careful examination of this record fails to disclose any error for which the decree of the court below should be reversed, and it is therefore affirmed.

Jungment affirmed.

WILLIAM B. OGDEN, Impleaded with
CHARLES BUTLER,
v.
WILLIAM M. LARRABEE, Adm'r.

57	389
124	386
57	389
41a	22
57	389
163	44
57	389
176	30
57	389
91a ¹	168

1. **VENDOR AND PURCHASER—rescission by the former—what constitutes—declaration of forfeiture.** The sale of land to a third person by the vendor, during the existence of a prior contract of sale, will operate as a rescission of such prior contract, and that fact of itself will amount to a declaration of forfeiture thereof.

2. **SAME—recovery of purchase money after rescission.** A vendor can not rescind an executory contract for the sale of land, and afterwards proceed to collect the purchase money.

3. **FRAUD in obtaining a judgment—remedy in chancery.** A court of chancery has power to annul and cancel a judgment at law if it has been obtained by fraud.

4. Where a vendor of land sold the same to another, thereby declaring a forfeiture of the prior contract, and also putting it out of his power to convey according to its terms, and afterwards obtained an allowance against the estate of the purchaser under such prior contract, for the unpaid purchase money, it was *held*, the procurement of the allowance under such

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circumstances was fraudulent in law, and a court of chancery should set aside and cancel the same.

5. **TRUSTEE—*what constitutes.*** A vendor of land executed a contract in writing, through his attorney in fact, for the conveyance thereof upon the payment of the purchase money at the times and in the manner therein specified. Subsequently, the purchaser, to secure a balance due upon the purchase money, assigned to such attorney in fact certain notes and mortgages, with "full power to settle, compromise or exchange the aforesaid mortgages and notes for other property or demands, taking part of the amount due in lieu of a larger part or the whole as he should think best in his judgment, and to cancel and discharge such mortgages from the record for such consideration as he might think proper," and to pay the proceeds to the vendor in satisfaction of his claim, and the residue to such assignor, the purchaser, or his heirs or assigns: *Held*, the assignee of those notes and mortgages held them and the proceeds of them as a trustee for the assignor, and subject to all the duties and restrictions properly incident to that relation.

6. **TRUSTEE *can not buy at his own sale.*** Upon foreclosure of one of the mortgages so held by the trustee, in his name as the assignee, it was *held*, that by reason of his relation to the fund, he could not properly become a purchaser in his own right under the decree.

7. The rule that a trustee can not rightfully become a purchaser at his own sale, and hold to his own use, applies as well where the sale is made under a decree of court as when made by himself.

8. **SAME—*of pledgor and pledgee.*** The broad powers given to the assignee of the notes and mortgages, to "settle, compromise, or otherwise sell, arrange or dispose" of them, did not operate to create the relation of pledgor and pledgee between him and his assignor. But even if that relation had existed, the law would not have conferred upon the pledgee any greater privileges or imposed less liabilities in dealing with the pledge, than in case of a trustee dealing with the trust fund,—so that in either case he could not purchase for his own use, at a sale had by virtue of that relation.

9. **SAME—*trustee held to his bid.*** Where, upon foreclosure of a mortgage, a trustee of the fund to which the mortgage belonged, through his attorney, bid off the land at the master's sale, in his own name, and attempted to hold it to his own use, it was *held*, upon bill filed by the *cestui que trust* to charge the trustee in respect to the subject matter of the sale, that although the attorney exceeded his authority in bidding for the property more than it was worth, yet the trustee, by subsequently accepting the master's deed, with knowledge of those facts, would be regarded as having ratified the act of his attorney, and be held to his election to take the purchase at his bid.

10. **SAME—*where trustee buys at his own sale, by whom chargeable and to what extent.*** While the trustee is forbidden to purchase at a sale under a

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decree of foreclosure of a mortgage belonging to the trust fund, yet if he does so become the purchaser, the sale is not for that reason void, but merely voidable, at the election of the *cestui que trust*. The sale would still operate to complete the foreclosure as against the mortgagor, but the purchaser would hold the property subject to all the conditions of the trust the same as he held the mortgage itself.

11. Where a trustee of any kind, buys property, directly or indirectly, of which he is the trustee, the *cestui que trust* may, at his option, without reference to the fact whether it was to his interest or not, and without proof that he is damnified, or even inquiring into that question, have the sale set aside, and have the property re-exposed to sale, or he may elect to have the sale affirmed at the bid of the purchaser, or, where the property has been subsequently sold by the trustee to a third party, to have the value of the property or the amount realized from the sale.

12. Where a trustee improperly purchased at his own sales under decrees of foreclosure, the biddings being upon distinct parcels of land, and at different times, and afterwards sold the several parcels, some at less than his bid, and others at a considerable advance, it was *held*, in fixing the rule of accountability of the trustee to the *cestui que trust*, the latter may elect to take the amount bid by the trustee in the one case, and the amount realized by him on his subsequent sale in the other.

13. TRUSTEE—INTEREST—of *annual rests*.—The rule seems to be, that in all cases where the trustee has used the trust fund, and it appears he has realized large gains and profits to himself, and has failed to keep any exact account of the same, or has refused to render an account to the beneficiary, the law will require him, in order that complete justice may be done, to account for the original fund so used, with interest computed with annual rests.

14. VENDOR AND PURCHASER—*forfeiture of contract and purchase money paid*. A contract for the sale of land provided that in case the purchase money should not be promptly paid, the vendor might at his option declare the contract at an end, and in that event, whatever money might have been paid upon the purchase should be absolutely forfeited to the vendor. Several payments were made, and at the request of the vendee, one half the land was conveyed to a third party, the vendee in the original contract receiving the entire purchase money therefor. Subsequently, the original vendor declared the contract forfeited for non-payment of the balance of the purchase money. Afterwards the vendee died, and the vendor obtained an allowance against his estate for the entire unpaid balance due on the whole tract sold, having sold and conveyed the remaining half of the land to other parties. On bill filed by the representatives of the vendee to adjust the equities between the parties, it was *held*, that while the vendor was not entitled to the allowance for all the purchase money remaining unpaid on the whole tract at the time he declared the forfeiture, yet he was entitled to

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compensation for the half of the land conveyed on the request of the vendee; and in adjusting the different payments made, which were upon the whole tract, and not upon either half specifically, it was held one half the money paid should be applied on that part of the land conveyed at the instance of the vendee, and the other half to be embraced in the forfeiture.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

This was a suit in chancery, instituted in the court below by Larrabee, administrator of the estate of James Spence, deceased, against William B. Ogden and Charles Butler, for the purpose of charging Ogden in respect to a certain fund alleged to have been placed in his hands in trust for Spence, during the life time of the latter. The bill also seeks relief against the allowance of a certain claim in favor of Butler against the estate of Spence, for purchase money for land claimed under a contract which had been rescinded by Butler, the vendor, before the allowance was obtained.

The facts are, substantially, as follows :

On the 22d day of July, 1836, James Spence entered into a contract with Charles Butler to purchase from him a part of block 34 in Kinzie's addition to Chicago. The defendant Ogden, signed the contract as attorney in fact for Butler. Spence was to pay for the land the sum of \$5,334.47,—\$400 cash in hand, \$2,434.47 in one year without interest, and the balance, \$2,500, in two years, with interest at 10 per cent after the 22d of July, 1837, to be paid annually. The contract provided that in case default should be made in the payment of the principal or interest for sixty days, all the provisions of the contract should be null and void, at the election of Butler, and all payments before made should be forfeited; and in case of such election, Spence, his heirs or assigns, in possession at the time, were to surrender possession, or hold as tenants under a rent equal to 10 per cent interest upon the whole price of the lot, Butler to have all rights and remedies of a landlord, and Spence to pay all taxes, assessments, etc.

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Spence paid the \$400 at the date of the contract, and it was indorsed thereon.

On the 5th of October, 1837, Butler, at the request of Spence, conveyed one-half of the land to Mark Skinner; Spence, by agreement, indorsed upon the contract, covenanting to remain liable for the entire payments, as before.

This agreement of Spence was as follows:

"I request that a deed be made for fifty-four and one-half feet deep by one hundred feet, from north side of the within premises, to Mark Skinner, he having paid me for the same, and I still remain holden for the whole amount of this contract, as before, and at my request the deed has been so made."

On the 8th of December, 1837, Spence assigned to Ogden four notes, secured by mortgages upon property near the city of Milwaukee, as collateral security for the payments then due, and thereafter to become due, upon said contract. That assignment was in writing, and the material parts of it are as follows:

"I, James Spence, by these presents, hereby assign, transfer, and set over to the said William B. Ogden, party of the second part, his heirs, executors, administrators or assigns, the following notes and mortgages, to-wit: Charles A. Spring's note to the party of the first part (Spence) for \$2561.50, dated 1st of September, A. D. 1836, and payable eighteen months from the date thereof, and said Charles A. Spring's mortgage of same date upon the undivided one-fourth part of lots numbered 7 and 8, in section numbered 21, in township numbered 7, north, in range number 22, E., situate in the town of Milwaukee, in the Territory of Wisconsin, executed to secure the payment of the aforesaid note.

"Also, Nathaniel Norton's two notes, dated 14th of September, A. D. 1836, as aforesaid, the one for \$830.33, payable twelve months after the date thereof, to the said party of the first part (Spence), and the other for \$853.77 payable to the same, eighteen months after date thereof, and said Nathaniel Norton's mortgage of the same date to the said James Spence, party of the first part, hereto, on the one-fourth part of the

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same premises, as described in Charles A. Spring's mortgage, aforesaid, to secure the payment of said notes.

"Also Seneca Stewart's two notes of same date, payable at the same time, and to the same party, the first for the same amount, that is to say, \$830.33, and the second for \$853.82, and said Seneca Stewart's mortgage of same date, on the one-fourth part of same premises, as before described in said Spring's mortgage, to secure the payment of the said two notes.

"Also, W. L. Pickering's two notes, of same date and amounts, and payable at the same time, and to the same party as said Stewart's notes, and, also, said W. L. Pickering's mortgage, of same date, on the remaining one-fourth part of said premises, to secure the payment of his said notes; the aforesaid mortgages being duly recorded in the register's office for the county of Milwaukee, aforesaid, on the 4th day of February, A. D. 1837, in Volume A of Mortgages, on pages 181 to 188, inclusive, as, reference being thereto had will more fully appear.

"And I, the said James Spence, do hereby authorize and empower the said William B. Ogden, his executors, administrators, and assigns, in my name or otherwise, and for his or their own proper use and benefit, to take, adopt, pursue and follow all lawful ways and means whatever for the collection, payment and satisfaction of the said notes and mortgages, and upon payment thereof to acknowledge satisfaction of the said mortgages, and cause them to be cancelled of record, and to transact and perform all lawful acts and things in the premises as fully and amply as I, myself, might or could do, were I acting therein on my own behalf. The aforesaid mortgages and notes hereby assigned, as aforesaid, are held by said Ogden, party of the second part, as collateral security for the payment of moneys due from me, James Spence, party of the first part, hereto, to Charles Butler, his heirs, or assigns, by virtue of the contract made by me with the said Charles Butler, through his attorney, W. B. Ogden, on the 22d day of July, A. D. 1836,

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for a part of the block numbered 34, in Kinzie's addition to Chicago, specified therein, and any and all moneys received upon any of the aforesaid notes, or from the avails of any sales of the premises included in said mortgages, or any of them, after defraying all costs, charges, commissions, fees and other expenses incurred in the collection of the same, are to be applied by the said W. B. Ogden in payment of the moneys due or to become due from me to the said Charles Butler, his heirs or assigns as aforesaid, and after discharging all liabilities owing or that may be owing by me to the said Charles Butler, his heirs, or assigns, or to the said William B. Ogden, his heirs or assigns, over and above all costs, charges, and fees, and expenses, as above stated, if there shall be any overplus in the hands of said Ogden, the same is to be repaid to me, my heirs or assigns, and I, James Spence, party of the first part, hereby further agree and authorize and empower the said William B. Ogden, his heirs, or assigns, to settle, compromise, or otherwise arrange or dispose of the aforesaid notes and mortgages, for such portion of the amount due thereon, or to take from them such further property or notes, or otherwise, as, in his judgment, shall be the most advisable, giving the same and all powers to him to settle, compromise or receive a part in satisfaction of a larger part, or the whole of said property, that I have, or would have in my own proper person, hereby sanctioning all such acts of said Ogden, his heirs or assigns."

This assignment was executed by Spence, under his hand and seal, and witnessed by the complainant, W. M. Larrabee.

On the same 8th of December, 1837, Spence assigned to W. B. Ogden, a mortgage made by Edward W. Fisk and W. L. Pickering, to him (the said Spence) bearing date 11th of July, 1836, made to secure the payment of two certain promissory notes, one payable six months from the date thereof, at the Fulton Bank, in the city of New York, for \$2,365.36, and the other payable twelve months after the date thereof, at either of the banks in the city of New York, for \$2,434.47, together

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with the two notes above described, and all moneys and interest due thereon, or to become due, and thereby authorized the said W. B. Ogden, or his attorney, heirs or assigns, to use his name, and all legal measures, to collect the notes, or foreclose the mortgage, and sell the premises therein described, in satisfaction of the money due and to become due on the notes, and to do all things necessary in relation to the said mortgage and notes, for the collection thereof, or otherwise, as fully "as I, myself, could do, and I hereby authorize him, the said Ogden, to prosecute the said Edward W. Fisk and W. L. Pickering, or either of them, for the payment of said note, and all moneys so received of Fisk or Pickering, or realized out of the sale of the premises described in the annexed mortgage, aforesaid, after deducting all costs, charges and expenses incurred thereon, to be applied upon my debt to Charles Butler, for part of block 34, in Kinzie's addition to Chicago, and more particularly described in the said Charles Butler's contract of sale to me of said part of block 34, bearing date 22d of July, 1836. It is further agreed and understood by me, that the said W. B. Ogden, his heirs and assigns, have as full power to settle, compromise or exchange, as aforesaid, the aforesaid mortgage and notes for other property or demands, taking part of the amount due in lieu of a larger part or the whole, as he shall think best, in his judgment, and to cancel and discharge such mortgage from the records, for such consideration as he may think proper, as was vested in me before making this assignment, accounting for such amount, only in the manner before mentioned, as he may receive.

JAMES SPENCE. [SEAL.]"

James Spence died at Chicago, on the 9th of May, 1838, without having made any further payment on his contract with Butler, than above stated, nor had anything been realized by Butler and Ogden upon the notes and mortgages which had been assigned to them as collateral security for Spence's indebtedness on his contract. Shortly after the death of Spence, and in the month of May, 1838, letters of administration upon his

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estate were granted to the complainant, W. M. Larrabee, by the proper authorities of Cook county, Illinois.

It appears from the mortgages themselves, and also from the testimony of Scammon and Ogden, that the four mortgages assigned by Spence to Ogden covered an undivided half interest of the mortgagors in the mortgaged premises, and that the other undivided one-half interest had been, by the same parties, mortgaged to one Seth Johnson, which mortgage was due and unpaid. On the 28th of May, 1838, Ogden filed four bills in equity, to foreclose these mortgages, in the United States District Court, at Milwaukee. It appears that Scammon at this time owned the Johnson mortgages, and that Ogden employed him, on their joint account, to procure the foreclosure of all the mortgages in four suits, in order to save expense of separate foreclosures on account of each of the mortgages. Scammon intrusted the business of foreclosing these mortgages to a lawyer at Milwaukee, who obtained decrees for foreclosure of the mortgages, and in the absence of instructions from either Scammon or Ogden, as to the amount which he should bid at the foreclosure sale, bid off the property in the name of Ogden, for \$4000, or \$1000 for each mortgage, and deeds were executed to Ogden in conformity with those bids and proceedings. It appears that Ogden then held the entire mortgage interest, one-half for the benefit of Scammon, and the other half for account of Spence. In November, 1839, Ogden filed a bill in the District Court of the United States at Milwaukee, to foreclose the Fisk and Pickering mortgage, and a decree was obtained in June, 1840; and on the 28th of September of that year, the mortgaged premises were sold under the decree, by the master in chancery of that court, to Ogden, for \$531.70, and a conveyance was made to him by the master. Ogden held the mortgaged premises, described in that suit, until the 26th day of July, 1851, when he sold and conveyed them to Edwin Townsend and others, for \$10,600. On the first day of April, 1841, Ogden sold and conveyed to Scammon all the property included in the four first mortgages above mentioned, made

by Spring, Norton, Pickering and Stewart, for \$275, which, in effect, was a sale to Scammon of the half interest which he, Ogden, then held on account of the Spence estate, Scammon then being the equitable owner of the other undivided one-half interest in those mortgaged premises. On the 3d day of April, 1841, Butler filed his claim against Spence's estate, in the county court, for the amount due upon the contract with Spence, and on the 2d day of December, 1841, it was allowed for \$6,386.43; and after this claim was presented to the county court, and before it was allowed, on the 1st of September, 1841, Butler, by Ogden, as his attorney in fact, sold the residue of the land, which had been first sold to Spence, to Walter L. Newberry, for \$550.

These are the facts, substantially, so far as it is necessary to present them here.

The questions arising in the case are set forth in the opinion.

Messrs. SCAMMON, MCCAGG & FULLER, for the appellant.

Mr. SIDNEY SMITH and Mr. H. R. SELDEN, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

The object of the bill in this case is to charge appellant with certain funds that, it is alleged, he has in his hands and holds in trust for the estate of James Spence, deceased. Relief was also sought against Charles Butler for an account of funds alleged to be in his hands, and also to have the allowance of a certain claim in his favor in the Cook county court against said estate set aside and cancelled, on the ground that Butler had put an end to the contract between himself and Spence before the allowance of the claim.

Several important questions arise on the record :

First. Is the appellant, Ogden, chargeable, at the election of the *cestui que trust*, with the sum of \$2000, the amount by him bid at the master's sale for the undivided one-half interest in

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lots 7 and 8, or is he chargeable only with the sum of \$275, the amount for which he afterwards sold the same?

Second. Is the appellant in like manner chargeable with the sum of \$531.70, the amount he bid for lots 1 and 2 at the master's sale, or is he chargeable with the full amount of \$10,600, for which he afterwards sold the same lots?

Third. If an account shall be ordered against the appellant, shall he be charged with interest with annual rests, or only with simple interest?

Fourth. Should the *cestui que trust* be charged in the account, if one shall be taken, with the value of the tract of land conveyed to Skinner, and if so, at what time, and what fund ought to be charged with the payment of the purchase money?

Fifth. Had Butler put an end to the contract between himself and Spence before the allowance of his claim against the estate, and, if so, could he afterwards lawfully obtain an allowance or judgment for the same in the county court?

We do not deem it necessary to consider the latter question indicated, at any considerable length. The evidence establishes the fact, beyond a doubt, that Butler had sold the remaining half of the parcel of land contracted to Spence, and had conveyed the same to Newberry, before the allowance of this claim in the county court against the estate of Spence. A party can not rescind an executory contract for the sale of land, and afterwards proceed to collect the purchase money. *Staley v. Murphy*, 47 Ill. 241.

Butler had previously conveyed the land, and thus put it out of his power to comply with his contract in case of compliance on the part of the vendee, and it would be most inequitable, after that, to allow him to collect the entire balance of the purchase money.

It is said there was no actual declaration of forfeiture of this contract on the part of Butler. It is true, there is no such expressed declaration to be found in the record, but no such expressed declaration is necessary. The act of the vendor, in

many instances, will be taken to amount to such a declaration, in law. *Chrisman v. Miller*, 21 Ill. 227; *Moore v. Smith*, 24 Ill. 512.

The sale of the property was a rescission of the contract, and that fact was itself the strongest possible declaration on the part of Butler that the contract was forfeited. Spence had not performed the contract, and Butler, by the sale of the premises to Newberry, placed it out of his power further to perform the contract on his part. There was, therefore, no contract existing at the time the judgment or order was obtained in the county court, and the obtaining of it was fraudulent in law, and the same ought to be set aside and cancelled. No doubt is entertained of the power of a court of chancery to annul and cancel a judgment at law, if it has been obtained by fraud. It has been so repeatedly held by courts of the highest authority. *Webster v. Reid*, 11 Howe, 437; *Wing v. Wing*, 9 Mod. 109; *Dobson v. Pearce*, 12 N. Y. 165.

The facts in this record present a proper case for the exercise of that power.

Our inquiry will be directed principally to the questions arising on the four propositions first above named.

On the facts contained in the record, what relation did the appellant sustain to Spence in his lifetime, and to his legal representatives after his death? Was it that of a trustee holding an estate to their use? If so, could he become a purchaser at his own sale, whether the sale was made by himself or under a judicial decree?

Spence purchased a tract of land from Butler, and held an agreement or bond, conditioned that Butler would make him a deed on the payment of the purchase money at the times and in the manner therein specified. The appellant executed the contract on the part of Butler as his attorney in fact. At the request of Spence, Butler conveyed one half of the parcel of land so contracted to him to Mark Skinner. It was understood between the parties, however, that Spence was to remain responsible to Butler for the entire purchase money. The

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conveyance to Skinner seems to have been solely for the accommodation of Spence. Shortly after this conveyance to Skinner, Spence, to secure the amount due Butler, for the entire balance of the purchase money due on the parcel of land, assigned and delivered to appellant certain notes and mortgages, with "full power to settle, compromise or exchange the aforesaid mortgages and notes for other property or demands, taking part of the amount due in lieu of a larger part or the whole, as he shall think best in his judgment, and to cancel and discharge such mortgage from the records for such consideration, as he may think proper," and to pay the amount so received to Butler in satisfaction of his indebtedness, and the remainder to Spence, or his heirs or assigns.

These facts would undoubtedly constitute the appellant the trustee of Spence to the extent of the funds in his hands, and would impose upon him the duty of the faithful application of the trust fund to the purpose intended, viz: the payment of the indebtedness to Butler. The appellant entered upon the discharge of the trust reposed in him, and must therefore be held liable to all the obligations resting on him in the discharge of such duties.

Under proceedings instituted for that purpose in the United States Court at Milwaukee, the mortgages thus assigned to appellant were foreclosed in the name of appellant, and at the master's sale under the decree rendered therein, he became the purchaser, on the 2d day of September, 1840, of lots 7 and 8, and on the 28th day of September, 1840, he became, in like manner, the purchaser of lots 1 and 2. Of the amount of these bids, there is no controversy. For lots 7 and 8, the bid was \$2000, that is, for the interest of Spence held thus in the name of appellant, and for lots 1 and 2 the bid was \$531.70. There is some controversy, however, as to whether appellant intended to make so large a bid on lots 7 and 8, and there is evidence that tends to show that the bid exceeded the value of the lots at the time. The bid was made for him by his authorized attorney at Milwaukee, and if the attorney exceeded his

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authority, the appellant should, in apt time, have repudiated the bid and had the sale set aside. In due time appellant received a deed for the lots under the bid thus made for him by his attorney, and he must, by that act, be held to have ratified the act of his attorney, and to have made the act of his attorney his own. Having received a deed with full knowledge of the amount bid, and that the bid was for more than the land was worth at the time, the appellant, by his act in receiving the deed, will be estopped on both questions, and must be held to his election to take the purchase at his bid. If he did not intend so to do, he ought to have made his election at the time, and had the sale vacated and set aside.

Soon after the appellant received the deed for lots 7 and 8, he conveyed the same to Scammon, who had an undivided interest in the same in his own right, for the nominal sum of \$275.

We are unable to discover any fact in this case that will take it out of the general rule, that a trustee can not rightfully become a purchaser at his own sale, and hold to his own use. It matters not whether the sale is made by himself or under a decree of court. The rule applies alike in both cases. *Thorp v. McCullom*, 1 Gilm. 614; *Dennis v. McCagg*, 32 Ill. 429.

It is insisted that that clause in the assignments of the mortgages to the appellant, invested him with the most ample power to "settle, compromise, or otherwise sell, arrange or dispose" of the said notes and mortgages, and that the relation only of pledgor and pledgee existed between him and Spence, and therefore the appellant had the right to become the purchaser of these lots at the master's sale, and hold the same for the benefit of the pledgee, and under the same power to "settle and compromise," and under the power vested in him by the assignments, he could lawfully sell the property to whomsoever would buy, and would only be chargeable with the amount of the sale which, in the case of lots 7 and 8, would be only \$275. We do not understand that these assignments created simply the relation of pledgee and pledgor, but if it

be conceded, we do not see that that would essentially change the relations of the appellant to Spence, or that the law in such a case would confer upon him any greater privileges or impose less liabilities in dealing with the pledge than the law imposes upon a trustee in dealing with a trust fund.

Under the power conferred by the assignments, the appellant could, no doubt, have received less than the amounts expressed on the face of the notes and mortgages, and would not have been chargeable for the loss in case he did so. The effect of the agreement was simply to relax the rule that a pledgee of securities could not, without express consent of the pledgor, take less than the amount expressed on the face without rendering himself liable to the pledgor for the amount so deducted.

But in the view we have of this case, that is not the exact question involved. The power conferred no new authority on the appellant to become a purchaser at his own sale, nor was it ever intended or contemplated by the parties to the assignments that he should do so. If he chose thus to bar the equity of redemption of the original mortgagors in the premises by taking the title to himself under the master's sale, he would still hold the property, as he did the original securities, in trust for Spence, to be applied for the purpose originally intended. By no fair construction of the assignments, was the appellant authorized to become a purchaser at his own sale, and to hold for his own use, and to dispose of the same to whomsoever would buy, without the consent of the *cestui que trust*.

We do not mean to be understood that the sale itself is invalid. It was only voidable, at the election of the *cestui que trust*. It was, doubtless, effectual to bar the equity of redemption of the original mortgagors, and valid and binding on all except the *cestui que trust*.

For the purpose of foreclosing and barring the equity of redemption of the original mortgagors, the appellant might be authorized to buy at the master's sale, and after he had bid off the property and thus foreclosed the rights of the original

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mortgagors, and all claiming under them, he would still hold it as he held the notes and mortgages as trustee for Spence, as security for his indebtedness to Butler. It was simply one step in the execution of the power conferred upon him, and the character of the fund was in nowise changed, nor his relations to it. It was still a trust fund, for the faithful application of which he was still liable to the *cestui que trust*. This doctrine was fully recognized in the cases of *Slee v. The Manhattan Company*, 1 Paige, Chy. 48, and *Hoyt v. Martense*, 16 N. Y. 231. In *Hoyt v. Martense*, it was held that the equitable rule which forbids a trustee or a person acting in a fiduciary capacity from speculating out of the subject of the trust, applies as well after the foreclosure as before.

In the case of *Slee v. The Manhattan Company*, the court, in speaking of the effect of a sale, either under the statute or under a decree, where the mortgagees of the debt secured by the mortgage, become themselves the purchasers, say, "in that case they only purchase the equity of redemption which existed in the original mortgagors, and the equity of redemption of the assignor still continues to attach itself to the legal estate which remained unchanged in the purchaser, except by this discharge of the equity of redemption of the original mortgagors, which, by the foreclosure, became merged in the legal estate."

If the appellant shall be regarded as the trustee of this estate, and we can not regard him in any other light, in view of the evidence and the relation of the parties, what are the rights of the *cestui que trust* in such cases? Can the *cestui que trust*, in this instance, elect to hold the appellant to the bid of \$2000, or will the law require him to receive only the amount for which the lots sold at the subsequent sale, viz: the sum of \$275.

It is insisted by the counsel, that the ordinary rule by which to charge the appellant for this property would be its full value at the time he sold it, and inasmuch as the proof shows that the property was sold to Scammon for its full value, that that

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is the highest amount with which the appellant can properly be charged for lots 7 and 8.

We have not been able to find any case, nor have we been referred to any, that fully sustains this view of the law. We do not understand that the terms of the assignment itself aid the view presented by the counsel. The appellant, in the light of the evidence, can only be regarded as holding the property in trust, and as having purchased it at his own sale. It is wholly immaterial whether the sale was under the power vested in him by the terms of the assignment, or under a decree of court, friendly or hostile to the interests of the *cestui que trust*.

The general rule is, that the *cestui que trust* may have his election to hold the trustee to the amount of his bid, or may have the property re-sold; and if at the re-sale the bid is advanced, the *cestui que trust* will be entitled to the excess over the bid of the trustee. But if the bid is not advanced, the sale will be confirmed, and the trustee required to account for the amount of his bid. This rule has been fully recognized by this court in *Thorpe v. McCullom*, 1 Gilm. 614, and is fully supported by authority. *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*, 6 Ves. 617.

The case of *Davoue v. Fanning et al.* 2 Johns. 251, is an elaborate review of the English cases on this question, and fully establishes the rule that the beneficiary in all such cases has his election either to acquiesce in the sale and have it affirmed, or to have it set aside and a re-sale ordered, and it makes no difference in the application of the rule whether the sale was at public auction, *bona fide*, and for a fair price. Mr. STORY says that "in all cases where a purchase has been made by a trustee on his own account, of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not." Eq. Jur. 2, 322.

The rule has been nowhere stated with more clearness and precision than by Chancellor KENT, in his Commentaries, where

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he says: "it may be here observed, as a general rule applicable to sales, that when a trustee of any description, or a person acting as agent for others, sells a trust estate and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled, as of course, in his election, to acquiesce in the sale, or to have the property re-exposed to sale under the direction of the court, and to be put up at the price bid by the trustee, and it makes no difference in the application of the rule that the sale was at public auction, *bona fide*, and for a fair price. A person can not act as agent for another and become himself the buyer. He can not be both buyer and seller at the same time, or connect his own interest in his dealings as agent or trustee for another. It is incompatible with the fiduciary relation." 4 Kent, sec. 438.

The rule seems to be uniform and inflexible, that where a trustee of any kind buys property, directly or indirectly, of which he is the trustee, the *cestui que trust* may, at his option, without reference to the fact whether it was to his interest or not, and without proof that he is damnified, or even inquiring into that question, have the sale set aside, and have the property re-exposed to sale, or he may elect to have the sale affirmed at the bid of the purchaser, or, where the property has been sold by the trustee to a third party, to have the value of the property, or the amount realized by the sale.

In many instances this rule may be found to work very serious hardships, but it has never for that reason been relaxed by the courts. It has been found by many year's experience, that the temptation to the trustee to take advantage of his peculiar position and misapply the trust fund to his own gain and profit, is so great that it is necessary to enforce the rigid principles of the law in every case. The rule has a wider and broader meaning. It may be said to have its foundation in a sound public policy, to secure the enforcement of all fiduciary obligations in which the public have a varied and ever increasing interest. In the multiplied and complicated transactions of the present day, there seem to be still stronger reasons for

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enforcing these just principles of the law than in former times. Fortunes were only amassed in those earlier days after long years of patient labor; indeed, only a few were successful. In the swift desire that now prevails, and by the opportunities afforded by the rapidly changing values of real estate, stocks and articles of merchandise, fortunes are realized in a comparatively short period. It is no time, therefore, to relax those wise and salutary rules that have been established by the judicial wisdom of the past to govern the relations between the trustee and the *cestui que trust*, but these facts, constantly occurring, which can not escape our common observation, constitute strong and controlling reasons for the most rigid enforcement of them.

It is insisted that the court erred in allowing the *cestui que trust* to elect to hold the appellant to the bid on lots 7 and 8, and to charge him with the amount realized on the sale to Townsend of lots 1 and 2. It is urged that but one rule of accountability should be applied to them, in which the appellant would be charged with \$2000 for the first bid, and \$531.70 for the second; or, if the *cestui que trust* elects to take the amount realized at either subsequent sale, he should be required to take both, in which event he would be compelled to receive \$275 for lots 7 and 8, and \$10,600 for lots 1 and 2.

The cases of *Jennison v. Hapgood*, 10 Pick. 77, and *Hapwood v. Jennison*, 2 Ver. 294, do, to a certain extent, sustain the rule contended for by the counsel, that the courts will require parties who elect to consider sales void, and have the property again brought to sale at a price at which it was bid off by the trustee, to have it put up at the re-sale, in lots or *en masse*, accordingly as it was bid off by the trustee. We think those cases state the law correctly on that question. The authorities all seem to agree that the right of election on the part of the *cestui que trust* to hold the trustee bound to carry out his bid or to relinquish it for the benefit of the trust, is confined to bids as they took place, whether in one lot or several, even at the same sale. *Ex parte Lacey*, 6 Ves. 625; *Ex parte James*, 8 Ves. 351.

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In *King v. Talbot*, 40 N. Y. 77, the court say, there is "no reason for saying that where the trustee has divided the fund into parts and made separate investments, the *cestui que trust* is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to adopt." In this instance the bids were separate and distinct and distant and apart, and for separate pieces of property, and no reason or authority to the contrary is perceived why the party should not be permitted to affirm the sale in one instance and hold the trustee to his bid, and disaffirm in the other case, and have an account taken of the profits arising from a subsequent sale. We think the court ruled correctly and in accordance with the adjudged cases on that question, and is fully sustained on principle.

It is urged that the court erred in allowing annual rests in computing interest on the account ordered to be taken against the appellant.

The rules of law applicable to trustees who misapply the trust estate without notice to the *cestui que trust*, often seem harsh and severe in their application to particular cases. They are intended, however, to impose a degree of punishment upon the trustee for the wrongful act. Such rules have their foundation upon the necessity that has been found by experience to exist to compel the performance of duties which the fiduciary relations impose. The courts, by way of making full compensation, will sometimes compel the trustee to purchase other estate of equal value, or they will permit the *cestui que trust*, at his option, to exact the proceeds of the same, with interest, and even in some instances he has been permitted to demand the present estimated value of the estate, in case of a resale to a third party. The latter rule, where the price and value of real estate advances with such rapidity as in this western country, would be deemed a very harsh, and, in many instances, an inequitable rule, and the party is seldom, if ever, permitted to elect to have that rule enforced. If that rule should be enforced in this case, it would be oppressive in its

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operation, for the evidence shows that the land sold by the appellant has greatly increased in value. It would be inequitable, therefore, to permit a party to elect under that rule under circumstances like those presented in this case, even if it be conceded that there has been a wilful misapplication of the trust fund.

If the trustee had kept an exact account, the equitable rule is, that he should account to the *cestui que trust* for all he has realized by the use of the fund. It is said "that the true rule in equity, in such cases, is to take care that the gain should go to the *cestui que trust*." 2 Story Eq. Jur. sec. 1277.

But if the trustee has not kept such an account, the law will still require him to make adequate compensation, and in order to do this, will at least presume he has made annual interest on the fund used, and will therefore, to effectuate this purpose, and to do justice, charge him with annual, and sometimes with semi-annual, rests, in the computation of interest. The rule seems to be, that in all cases where the trustee has used the trust fund, and the court can see from the evidence that the trustee has realized large gains and profits to himself, and has failed to keep any exact account of the same, or has refused to render an account to the beneficiary, the law will require him, in order that complete justice may be done, to account for the original fund so used, with interest computed with annual rests. No better mode has yet been devised to effectuate and promote the ends of justice. This rule may be said to be the settled doctrine of this country and of England, on this question.

In *Schieffelin v. Stewart et al.* 1 Johns. Chy. 620, the chancellor said: "It is certain that the allowance of compound interest is often essential to carry into complete effect the principle of the court, that no profit, gain nor advantage shall be derived by the trustee from the use of the trust fund. All the gain must go to the *cestui que trust*. This is the true equity doctrine. It secures fidelity and removes temptation, and it is the ground of this allowance of annual rests in the taking

of the account where the executor has used the property and does not disclose the proceeds."

In *Barney v. Saunders*, 16 How. 539, the court said: "When a trust to invest has been grossly and wilfully neglected, where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment or as a measure of damage, for undisclosed profits, and in place of them."

In *Raphael v. Boehn*, 10 Ves. 92, the chancellor allowed semi-annual rests, but it was under peculiar circumstances, where there were large sums to be invested, and perhaps the case does not establish a general rule on that question. The case was again before the court upon a rehearing, and the doctrine advanced in the former opinion was affirmed. It is, perhaps, true, that there are some exceptions to the general rule, that in taking the account against the trustee, he will be charged with compound interest. The application of the rule may be said to depend somewhat upon the circumstances of each case, as in the case of *Raphael v. Boehn*, *supra*.

In *Raynor v. Bryson*, 29 Md. 473, it was held that compound interest should never be allowed, except in cases where there had been intentional misconduct or gross negligence on the part of the party withholding the money.

If the doctrine in that case is to be applied to the present one, the evidence brings it clearly within the rule there stated. There is evidence in this record tending to show gross negligence on the part of the appellant in these transactions, in the application of the trust fund. By his own testimony, he certainly knew, at the time he made the sale to Townsend, that he did not own the property in his own right; that he held it in trust for the legal representatives of Spence, for he attempted to procure, and perhaps did procure, a release from the heirs. When the sale was effected after the release was procured, instead of applying the proceeds to the benefit of the estate of Spence, as it was his plain duty to do, the appellant applied

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the proceeds to the credit of what is called "the Hunter purchase," in which he was himself personally interested. The appellant had no right to sell lots 1 and 2 after he discovered that he held them in trust for the estate of Spence, and he ought then to have made a fair and full disclosure of the whole facts to the legal representatives. Instead of doing that, he procured the release from the heirs, upon what representations we know not, and placed the funds realized from the sale to the credit of the land company, where, doubtless, large profits were realized, of which he offers no explanation or gives no account, in his answer or otherwise. It further appears that after the contract between Butler and Spence had been annulled and rescinded by the conveyance of the land to Newberry, the appellant, with full knowledge of all the facts, received from the administrator a dividend of \$297.80, on the claim allowed for the purchase money. It is difficult to explain all these transactions consistently with that fair and equitable dealing which the law requires between trustee and *cestui que trust*. We must, therefore, conclude that appellant has wilfully misapplied the trust fund, at least so far as the proceeds of lots 1 and 2 are concerned, and under either rule of law suggested, he must be charged in the account to be taken with interest at annual rests. The appellant has failed to render any account of the profits realized out of the use of the trust fund, and has even denied his liability to be called to an account. The facts in this case present a clear case for the application of the strict principles of the law. The evidence discloses that the investment of these funds by the appellant must have been very profitable, and he must have realized large profits therefrom, of which he gives no account, and it is doubtful whether the rule which requires him to account for the original fund, with interest computed with annual rests, will do complete justice between the parties.

There is still another question involved in the case. It appears that Butler, at the request of Spence, conveyed to Skinner one half of the tract of land contracted to him. The

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consideration expressed in the deed is \$2250, about one-half of the balance of the purchase money due Butler on the original purchase. What the real consideration was, the evidence does not show, and it is, perhaps, immaterial. It is certain that Butler parted with his interest in the land for the benefit of Spence. We can perceive no reason why Spence or the estate should not be charged with a proportion of the purchase money of the land conveyed to Skinner, and it seems to us that it would be most inequitable to allow the legal representatives of the estate to retain the same without making compensation therefor. The appellee comes into a court of equity and asks to have the equities between the parties adjusted, and he must, therefore, himself, do that which is just and equitable. The sale of the land to Newberry, while it put an end to the contract, so far as it remained to be executed, did not and could not affect that part that had already been executed. Spence had received the benefit of the conveyance to Skinner and Butler; had parted with his interest in that portion of the property. The parties, by their mutual agreement, severed the contract, and the vendee received a deed to his grantee for one half the land. To that extent the contract was executed, and Butler was, in law and in equity, entitled to compensation for that portion of the property. If Spence should not be required to pay for the land conveyed to Skinner, it is manifest that he would get one half the land he purchased, for nothing, simply because he failed to pay for the other half. We do not see how the equities between the parties can be adjusted upon any equitable principle, unless the estate should be charged with the just proportion of the purchase money for the one half the property thus conveyed to Skinner at the request of Spence, and for which he received the benefit in his lifetime.

The decree of the court below proceeds upon the correct principle, and we are entirely satisfied with the decree, except in this one particular. The court adopted the true rule for stating the account between the parties, and it is approved by

Dissenting opinion of JUSTICE SHELDON. Additional opinion of the Court.

this court in every particular except the one indicated. We are of opinion, however, that the court ought to have directed the master, in stating the account, to charge the estate with one half the original purchase money for the land contracted to Spence on account of the one half conveyed to Skinner. For this error alone this decree must be reversed and the cause remanded.

The court will direct the master to charge the estate with one half the amount of the purchase money of the tract of land contracted to Spence by Butler, and to apply, in payment thereof, 1st, the \$400 cash received at the time the contract was made; 2nd, the \$500 received from the sale of the 160 acres of land; 3d, the amount received on the Raynor note; and, fourth, so much of the \$2000 bid for lots 7 and 8 as shall be necessary to make up the amount of one half of the original purchase money, and will decree, in all respects, as in its former decree.

Decree reversed.

Mr. JUSTICE SHELDON dissents from so much of the foregoing decision as charges Ogden with the amount of his bid for lots 7 and 8 on the foreclosure sale of them, being of opinion that, under the circumstances of this case, he should be charged only with the proceeds of the sale of the lots by him, and interest thereon, and not with the amount of said bid.

At a subsequent term, on the petition of the appellant, a rehearing was granted, whereupon the following additional opinion was announced :

Per CURIAM: On the petition of the appellant, a rehearing has been allowed in this case on a single point, viz: that the payments made upon his contract by James Spence ought not to be wholly applied on account of the one half of the land conveyed to Mark Skinner, but ought to be divided so as to

apply one half of **them** on that, and the other half on that part of the land which was **retained** by Butler after forfeiture of the contract.

This point was not made or argued on the original **hearing**, and was not considered by the court.

The contract between Butler and Spence provided, that in case default of payment of principal or interest for 60 days after the same became due, Butler, at his option, should have the right to declare the contract forfeited, and that all payments made on the contract should be absolutely and forever forfeited to him. We held that, under this provision of the contract, Butler, by the deed to Newberry, made on the first day of September, 1841, and acquiesced in by the heirs of Spence, did put an end to the contract, and declared the same forfeited.

In view of the fact that the payments that were made by Spence, in his lifetime, were made on the whole lot, we are of opinion that the directions given in the original opinion for computing the amount due from appellant should be modified. The directions there given are hereby so modified that the Superior Court will direct the master in making the computation to charge the appellant with one half the payments made by Spence in his lifetime on the contract, and to regard the other half of such payments as lost to the estate, according to the terms of the agreement.

The decree is reversed, and the cause remanded for further proceedings consistent with the former opinion as now modified.

Decree reversed.

WILLIAM WHEELER *et al.*

v.

THE CITY OF CHICAGO.*

1. SPECIAL ASSESSMENTS in *Chicago*—evidence admissible to defeat a judgment. Upon an application for judgment upon a special assessment in the city of Chicago, it is admissible for the objectors to prove, under a proper objection filed to a recovery of the judgment, that the commissioners of the board of public works did not take the oath to faithfully execute their duties, as required by the statute. This provision of the statute being imperative, the omission of the commissioners to take the oath prescribed before proceeding to make the assessment, invalidates the proceeding.

2. It is also a fatal objection to a recovery, that the commissioners did not, in fact, have any meeting at a public place, at the time designated in their notice of the assessment.

APPEALS from the Superior Court of Chicago.

The questions in these records arise upon an application for judgments upon a special assessment, in the city of Chicago against certain lots of ground. The city recovered judgment, and the objectors appeal.

PER CURIAM: These records present the same questions. It appears from the record in each case that, upon the trial in the court below, under a proper objection filed to the recovery of the judgment, appellants offered to prove that the commissioners of the board of public works did not take the oath to faithfully execute their duties, as required by the statute. The statute is imperative, and if they wholly omitted taking the oath prescribed, before proceeding to make the assessment, such

* This case and the following are considered in the same opinion: *Unknown Owners & Martin O. Walker v. The City of Chicago*; *Charles Follansbee & D. M. Tucker v. Same*; *S. J. McCormick & M. O. Walker v. Same*; *Chicago & Great Eastern R. R. Co. and Cornelius W. Story v. Same*; *Unknown Owners & Martin O. Walker et al. v. Same*; *L. C. P. Freer and Azel Dorathy et al. v. Same*.

Syllabus.

omission would, under this statute, invalidate the proceedings. The evidence was admissible, and it was error to exclude it.

It was also competent to prove, under a proper objection to the recovery, that the commissioners did not, in fact, have any meeting at a public place, at the time designated in their notice of the assessment. In some of the cases, such evidence was offered and excluded by the court. This was error, also.

Finding error in these records, the judgments of the court below will be reversed and the causes remanded.

Judgments reversed.

JOHN FAULDS

v.

WILLIAM YATES *et al.*

57	416
153	257
154	357

57	416
d112a	1801

57	416
e214	1598
e214	600

1. **CONTRACTS—CORPORATIONS**—*of a combination between a portion of the members of a corporation to control it.* Three persons owning a majority of the stock of an incorporated company organized for the purpose of mining coal upon their lands, and having leased the premises, formed a partnership for the prosecution of the business, entered into an agreement, as between themselves, that they would elect the directors of the company; that they would determine among themselves as to its officers and management, and that if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election: *Held*, this agreement was not void, as against public policy; the persons owning a majority of the stock had a right to combine, and thus secure the board of directors and the management of the property.

2. **PARTNERSHIP—real estate.** Real estate belonging to a partnership will, in equity, be treated like its personal funds, and distributed accordingly. If the title stands in the name of one of the partners, he will be held as a trustee of the partnership, and be made to account to the other partners according to their several rights and interests.

3. So where one of three partners purchased real estate for the partnership, each contributing his proportion of the purchase money, but the

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purchasing partner took the title in his own name, upon a dissolution of the partnership, and a settlement of its affairs, in chancery, it was held proper to compel the partner holding the title to convey to each of the others his proportionate interest.

4. *SAME*—where the purchasing partner has received an undue proportion of the purchase price. And where the partner who made the purchase, represented to his co-partners the purchase price he had agreed to pay to be greater than was the fact, and they agreed to pay, and did pay, their proportion according to such false representation, yet upon seeking to compel a conveyance, in equity, the partners so contributing more than their proper share, would not be entitled to be reimbursed for that excess. Where a conveyance of land is asked, it must be granted upon the specific terms of the agreement.

5. *PARTIES—in chancery.* Where a part of the members of an incorporated company form a partnership between themselves for the purpose of carrying on the business of the company, under a lease, upon bill filed by one of the partners for a dissolution and a settlement of the partnership affairs, the corporation is neither a necessary nor a proper party.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. CHARLES H. WOOD, Judge, presiding.

Messrs. DENT & BLACK, and Mr. EDWARD H. BRACKETT, for the plaintiff in error.

Mr. W. BUSHNELL, and Mr. J. C. CHAMPLIN, for the defendants in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The Chicago Carbon and Coal Company, a corporation organized under a special law, issued certain shares of stock. A majority of the shares were purchased by plaintiff in error. The company owned a large amount of lands, valuable for coal, and had leased them to one Kirkland until May 1st, 1866, with the privilege of a renewal for three years, in consideration of 15 cents per ton for each ton of coal mined, until the opening of certain new mines by the company. After that he was to

pay \$5000 per year as rent for the demised premises. Kirkland assigned this lease to Faulds, Yates and Bunn, and this transfer was approved and consented to by the company, by a resolution entered upon its minutes, on the 31st of January, 1866. They assumed, by an indorsement on the lease, all the responsibility and liability which Kirkland was subject to by virtue thereof.

Y On the 1st of February, 1866, Faulds, Yates and Bunn executed articles of co-partnership, in which the stock owned by Faulds was valued at \$60,000, and Yates and Bunn agreed to purchase two-thirds of it for \$40,000, and Faulds was to superintend the mining operations, and Yates and Bunn to furnish two capable men to sell coal, and generally manage the financial affairs of the concern; and it was expressly understood that each party was to be equally interested in the business. These parties embarked their money, in equal proportions, in the purchase of this lease, for the purpose of prosecuting mining operations, and the development of the mineral resources of the Chicago and Carbon Coal Company. The written agreement constituted essentially a partnership. It was a voluntary contract, between persons, to place their money in a lawful business, and to share the profits and loss in equal proportions.

The shares of stock purchased by defendants in error were paid for, and after the formation of the partnership the mining operations commenced, and continued until December, 1866. During this time the defendants in error furnished to Faulds over \$19,000, which were used by him in carrying on the business. This amount was expended by him, and yet no profits were realized by Yates and Bunn; and Faulds failed to pay his share, or indeed any part, of the expenditures.

After the formation of the partnership, Faulds purchased the "Sanger tract" of land, as it is known in the record, for \$8,000, but represented to Yates and Bunn that he had paid for the same \$9000; that this tract was essential to their successful operations; and induced them to purchase two-thirds

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of the tract at \$6000, which they paid, but received no deed to the land. The agreement was, that a deed should be made.

In December, 1866, Faulds abandoned the work, and wholly failed to perform his part of the agreement, and soon after, Yates and Bunn commenced their suit in chancery, for a dissolution of the partnership, and an account and the conveyance to each of them of the undivided one-third of the "Sanger land."

The bill charges fraud and misrepresentation in regard to the sale of the shares of stock. The misrepresentation is fully proved, but was prior to the formation of the partnership. The representations, in regard to the value and cost of the stock, were proved to be untrue; but they were made, as recited in the written contract between the parties, before its execution.

It may fairly be deduced from the evidence that the "Sanger tract" was purchased by Faulds with the design that it should constitute a part of the partnership property.

The court below decreed that the plaintiff in error convey to each of the defendants in error the one undivided third of the "Sanger tract," and pay to them \$666.67, the excess paid by them for the Sanger land, and the one-third part of \$19,259.16, the amount advanced by defendants in error in the mining operations.

A reversal of this decree is asked for, upon the following grounds: 1st. That the agreement between the parties is void, as against public policy. 2nd. That there can be no chancery jurisdiction arising out of the Sanger tract of land, and that there was full remedy at law. 3d. That the evidence does not sustain the allegations of fraud.

There were 1300 shares of stock of the Chicago Carbon and Coal Company, not owned by Faulds, Yates and Bunn. They did, however, own more than one-half of the shares; and it was provided in the agreement between them, that they would elect the directors of the company; that they would determine among themselves as to the officers and management of the

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company, and that if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election.

It is contended that these parts of the agreement were intended for dishonest and fraudulent purposes, and were in conflict with the interests of the other stockholders, and absolutely void.

It should be remembered that the lease, by virtue of the assignment and renewal of which these parties obtained possession of the property, was made in 1863; and hence its terms and conditions were determined three years before Faulds, Yates and Bunn purchased any stock. The old board of directors approved the renewal of the lease, and then these parties, and two others, were elected directors.

The record wholly fails to disclose any injury to the other shareholders—any waste of the property; but, on the contrary, it appears that Bunn and Yates furnished for the improvement of the property over \$19,000. There was no fraud in the agreement, which has been so bitterly assailed in the argument. There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons, owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle, that the whole are bound by the acts of the majority, when the acts conform to the law of their creation.

The co-operation, then, of these parties, in the election of the officers of the company, and their agreement not to buy or sell stock, except for their joint benefit, can not properly be characterized as dishonest and violative of the rights of others, and in contravention of public policy. If one man owned a majority of the stock, he surely had the right to select the agents for its honest management. These three persons had formed a partnership for mining, under the lease of the

company. They knew they must make large expenditures of money. Incompetent and unfriendly directors and officers might involve them in much trouble, heavy expense and useless litigation. They had a double interest to protect,—their interests as shareholders, and their interests as lessees. It is strange that a man can not, for honest purposes, unite with others in the protection and security of his property and rights without liability to the charge of fraud and iniquity.

This agreement was made between persons who had invested a large amount of capital in an enterprise somewhat perilous. As shrewd, skillful and prudent men, they were desirous of increasing the investment, and making the stock more valuable. Their interests were identical with the interests of the minority shareholders. They could not destroy the property of the company, for the lands were of immense value if the mineral resources failed. If they increased the value of their own stock, they also increased the value of all other stock. If they destroyed the stock of others, they also, by the same act, destroyed their own. It is absurd to suppose that a sane man will ruin himself for the mere pleasure of ruining others.

The agreement complained of was entered into by Faulds and his partners. The shareholders, whom he is so solicitous to defend and protect, have not complained. He can not invoke their shield to fight imaginary wrongs. The transaction which he, through his counsel, denounces as fraudulent and nefarious, was conceived and consummated by him, as much as by his partners. Every motive which could influence a man for good, should have prompted him to silence.

If this combination was fraudulent and intended for bad purposes, the stockholders, who are in a minority, and who may have suffered, have ample redress. We prefer to listen to them, before any decision as to their wrongs.

The cases cited to sustain the position, that this agreement is void, are unlike the case at bar. In *Hawley v. Cramer*, 4 Cowen, 717, it was held that a purchase by an attorney for three of his clients, was fraudulent as against the other two,

who were absent; also, that an agreement between different persons, not to bid against each other, but to divide the profits, was against public policy.

In *Randall v. Howard*, 2 Black, U. S. R. 585, it was decided that the law would not enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. In *Wheeler v. Sage*, 1 Wallace, 518, the same general principle is declared, as in the case of *Randall v. Howard*, *supra*.

✓ The agreement in this case was not for the injury of the minority stockholders. It could not have been so intended, and we can not perceive that it could so operate. The selection of proper officers, the prudent management of the coal mines, the careful sale and purchase of stock, as provided for in the agreement, together with the expenditure of money in the improvement of the property, must have resulted in benefits to all the stockholders, and not alone to the parties to the particular agreement.

A careful reading of the contract shows no hidden advantage intended, no fraud, no dishonesty. For aught which we can discover in the record, if Faulds had performed faithfully on his part, this litigation might have been avoided, and the partnership have prospered.

It is next insisted that no relief can be granted as to the "Sanger land." The preponderance of the evidence is, that this land was purchased for the partnership.

Faulds denies that he sold it to Bunn and Yates, or that he purchased of Sanger, but admits that he told Bunn that he and Yates must join him in the purchase. Yates testified that Faulds informed Bunn and himself of the purchase; that this land was essential to the prosecution of their business, and that he requested them to join him; that they did so, and each paid \$3000. Bunn fully corroborates Yates. Faulds is contradicted by Sanger, who testified that he did sell the land to Faulds, and received from him the sum of \$5800, in part payment, about the 1st of April, 1866. This was about the time defendants in error paid the \$6000.

Notwithstanding the denial by Faulds, we are forced to the conclusion that he at least is mistaken, and that the "Sanger land" was purchased as partnership property; and that Bunn and Yates each paid \$3000 therefor. The balance of the purchase money was paid by Faulds.

This land, then, was bought for the use of the partnership. The funds of Bunn and Yates were paid as a part of the purchase money. Common honesty requires that each of them should have a conveyance of one-third of this land. Real estate, belonging to a partnership, will, in equity, be treated like its personal funds, and distributed accordingly. The party in whose name it stands should be held as a trustee of the partnership, and be made to account to the partners, according to their several rights and interests.

There was, however, error in the decree, in directing that Faulds should refund \$666.66 $\frac{2}{3}$, which, it is alleged, he received above the actual amount of purchase money for the Sanger land. The other partners agreed to pay \$6000 for two-thirds of it. This was the contract. They have affirmed it by the allegations of the bill. They might have abandoned it, and sought other relief. But when a conveyance of the land is asked, it must be granted upon the specific terms of the agreement.

In this case, the means of information, as to the value of the land, were alike open to all parties. Bunn and Yates were upon the land, before payment, and made some examination of it. In such cases, equity will not relieve.

The objection is taken to the decree, that it orders a conveyance to Yates and Bunn by a joint warranty deed of an undivided one-third part of the Sanger lands. This is not true, in fact. The decree directs that the "defendant convey unto each of the complainants, by a general warranty deed, an undivided one-third part," etc.

It is unnecessary to advert to the objection, that the allegations of fraud are not sustained by the proof. The agreement between the parties was one of partnership for the management

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of the leased property, and the plaintiff in error should be compelled to account, particularly as a decree of dissolution had been entered by agreement of the parties.

We do not think the Chicago Carbon and Coal Company was a necessary or even a proper party. Neither the stock nor the property of the company could be affected by any decree which could have been rendered. The corporation had no interest in the private affairs of these parties.

The decree of the court is reversed, so far as it directs the plaintiff in error to refund the sum of \$666.66 $\frac{2}{3}$, and is, in all other respects, affirmed; and the court below is directed to make this modification.

The decree is reversed and the cause remanded, with direction to make the modification suggested.

Decree reversed.

THE CHICAGO ARTESIAN WELL COMPANY

v.

THE CONNECTICUT MUTUAL LIFE INSURANCE Co. *et al.*

1. *CROSS BILL—whether germane to the subject matter of the original suit.* A party filed a petition to enforce a mechanic's lien, making, among others, a subsequent grantee of the fee in the premises, and a mortgagee, parties defendant. After the commencement of this proceeding the mortgagee, under a power contained in the mortgage, sold the premises to a third person, to whom a deed was made. Thereupon the owner in fee filed his cross bill, charging that the sale under the mortgage was in fraud of his rights, and asking relief in respect thereto: *Held*, the subject matter of the cross bill was germane to that of the original suit, although it was something which did not affect the interest of the petitioner himself, in the suit.

2. *SAME—time for filing cross bill.* The cross bill in this case was not filed until after a final decree was entered in the original suit, declaring the rights of the parties in respect to their several liens, but as it did not propose to interfere in any way with the operation of that decree, nor tend to

57	424
38a	319
57	424
150	403
57	424
158	559
57	424
165	233
57	424
181	458

delay the petitioner in securing his rights under it, the cross bill was regarded as filed in sufficient time to be considered. In a case so circumstanced, it ought never to be too late to file such a cross bill, so long as the court has control of the case.

3. *SAME*—*whether the cross bill should be retained after the original ground of suit is satisfied.* After the filing of the cross bill the claim of the original petitioner was paid, but it did not follow that the court had no power after that to determine questions between co-defendants. They were still before the court, not necessarily dismissed from it by such payment of the petitioner's decree, and the bill had not been dismissed. The cross bill in such case should be retained, for the purpose of settling the question presented by it, and it was erroneous to refuse a motion for a rule upon the defendant thereto to answer the same, at that stage of the proceedings.

4. *EXCEPTIONS—in chancery.* It is not necessary to except to the ruling of the court in a suit in chancery for improperly refusing a motion for a rule upon the defendant to a cross bill, to answer the same.

5. The rules of chancery practice do not require that exceptions should be taken to the various decisions of the court made in the progress of the cause.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JOHN N. JEWETT, Mr. E. A. STORRS, and Mr. H. CRAWFORD, for the appellant.

Messrs. GOUDY & CHANDLER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

On the 8th day of July, 1867, the Northwestern Manufacturing Company filed its petition in the Superior Court of Chicago, to declare and enforce a mechanic's lien upon 40 acres of land, lying in Cook county, and known as the Artesian Well property.

The debt for which the lien was claimed was contracted by A. F. Croskey & Co. who, at the time of the creation of the debt, were owners of the fee of the premises.

This fee was afterwards, on the 12th of March, 1867, conveyed to the Artesian Well Company. The company was made a party defendant.

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The Connecticut Mutual Life Insurance Company, and George S. Carmichael, the appellees, were made parties defendant, as mortgagees, and answered, the first, that it held a mortgage on the property for \$15,000, and the last, that he held one for \$7500, but neither asked to have his or its mortgage foreclosed, or for any affirmative relief.

Decree, on final hearing, February 18, 1868, found the amount due the petitioner to be \$1950, and that it was entitled to a lien therefor; that Corey also had a lien for \$2099.50 under a decree of the Superior Court of Chicago, dated December 16, 1867; that the Connecticut Mutual Life Insurance Company had a lien on the premises for \$15,000 and interest from May 10, 1867, at 10 per cent, on account of a mortgage for that amount, executed to said company by Croskey and wife; that defendant Carmichael had a lien on said premises for the sum of \$7500, with interest at 10 per cent from 15th of September, 1867, by virtue of a mortgage held by him, and the court found that sum due him on account thereof. The decree further found that Croskey and wife conveyed the premises to the Artesian Well Company, but subject to the above mentioned liens.

It further ordered and decreed, that the said Artesian Well Company, and the said Croskey, and the said Shufeldt, or any of the above named defendants, if they should so elect, have 90 days from the date of the decree to pay to the said petitioner the said sum of money so found due it, together with interest and costs; and in case the same should not be paid within said 90 days, it was ordered and decreed that after the expiration of the said 90 days, the said premises, including the land and buildings, be sold to pay and satisfy said several sums of money so found due and so becoming due to the above named parties; and in case of default in the payment of the money so found due the petitioner, the master to proceed and make the sale. Master to report the separate value of the land and improvements, and the fund to be deposited in court, and to be appropriated by the court to the payment of the said

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above named sums of money, with interest, according to their respective priorities as therein established.

Prior to the expiration of this 90 days, the defendants sued out a writ of error from this court, which was made a *superse-deas*, and the proceedings under the decree stayed.

The cause was heard in this court at the September term, 1868, and the decree of the court below was in part reversed, and the cause remanded for the purpose of taking further testimony relative to the time when the materials were furnished and as to the priorities of some of the liens.

In May, 1869, this testimony was taken. It appears in the record that Carmichael, in the month of June, 1869, became the equitable owner of the Connecticut Mutual mortgage.

It also appears that, on the 5th day of January, 1870, Carmichael foreclosed his \$7500 mortgage, and by virtue of a power of sale to himself therein contained, sold the property in question to James E. Starr, under a notice of sale given December 22, 1869.

On the 28th day of January, 1870, a cross bill was filed by Storrs & Wilson, as solicitors, in the name of the Chicago Artesian Well Company. It sets forth the sale to Starr as aforesaid for \$9300, subject to said \$15,000 mortgage; that a deed had been executed and recorded; charges that the sale was made fraudulently and by collusion with Starr; that the Well Company had no knowledge of the sale, or that Carmichael intended to make it; that it was made pending these proceedings; that it was irregular and fraudulent, and prays that Carmichael and Starr be made defendants, and answer the bill, that a summons may issue to Starr, and the sale be set aside, and the complainants be allowed to pay off the mortgages, and makes offer to do so.

On the 14th day of February, 1870, Henry W. Bishop, Jr., was appointed receiver for the Artesian Well Company, in a suit in the Circuit Court of the United States.

February 14th, 1870, the affidavits of Rufus King and Allen C. Storey were filed; that of the former, stating that he was

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secretary of the Well Company, and that the filing of said cross bill was without any authority on the part of the company; and that of the latter, stating that he is the sole attorney of said Artesian Well Company in this suit, and that said cross bill was filed without his knowledge or authority, and without that of any officer of the company.

On the 7th of February, 1870, Carmichael, as the owner of the Connecticut Mutual mortgage, tendered to the Northwestern Manufacturing Company the amount of the lien which had been decreed to it as hereinbefore stated, which was refused, and he brought into court the sum of \$2300, sufficient to cover the petitioner's lien, and costs, and on the 14th of March, 1870, filed his motion to have the decree satisfied and the suit dismissed.

This is one of the motions on which the order now appealed from was made.

On the same day, but immediately after the filing of Carmichael's motion, Bishop, as receiver of the Artesian Well Company, brought into court two several sums of money, to wit: 1st, the sum of \$2250; 2d, the sum of \$26,935.56. And thereupon the said receiver filed a petition on behalf of the Artesian Well Company, stating the making of said decree, and the establishing of the liens therein mentioned; also the reversal of the decree, the subsequent hearing, and that no final decree had been entered; praying that the sum first above mentioned in the petition might be applied and paid in satisfaction of the lien of the original petitioner, and that the second sum of money be applied in payment of the balance of the liens mentioned in the decree; and that Carmichael be ordered to bring into court his mortgages, notes and securities, to have the same cancelled, and that the Artesian Well Company might be declared to be the owner of the premises, free of and discharged from all liens and encumbrances.

And upon this petition a motion to the effect above mentioned was filed.

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Upon the hearing of this motion, with that of Carmichael before mentioned, the order appealed from was made.

These several motions were not heard at that time, but were postponed from time to time until the final hearing on the 20th of July, as hereinafter mentioned.

On the 11th of June, 1870, the Northwestern Manufacturing Company filed its petition, asking to take the money deposited by the receiver, and, upon the receipt of the same, offered to satisfy the decree.

On the same day the affidavit of H. W. Bishop, Jr., was filed, stating his appointment as receiver as aforesaid; that the records of Cook county showed a conveyance to Starr under a power of sale in Carmichael's mortgage; that he was advised that it was necessary, for the protection of the rights of the Well Company, for the court, on entering satisfaction of the decree, by reason of the payments made into court on the 14th of March, to enter a further order barring all claims and titles of said purchaser *pendente lite*, and declaring the title of the Artesian Well Company, as decreed by the original decree herein, was in no wise annulled by such purchase, which he prayed might be entered.

On the 16th of July, 1870, Carmichael filed another petition, alleging that he was the owner of the Connecticut Mutual mortgage, and that there was then due upon it, principal, interest, etc., the sum of \$21,613.13; that, as the receiver had obtained from Ricketts a sufficient amount of money to pay this claim, protesting that the mortgage was not merged in the decree, and that the deposit was not a lawful tender, he expressed a willingness to receive the money; declined to receive the money on the \$7,500 mortgage; said he had sold the property under a power of sale to Starr, and had no further claim upon it in that respect, and prayed an order on the clerk to pay to him the amount of the mortgage to the Connecticut Mutual Life Insurance Company.

These several motions being pending, the court, on the 13th of June, 1870, ordered a reference to a master in chancery, to take proofs and depositions, and report the same to the court.

The master's report found, substantially, the truth of the matters as set forth in the foregoing motions, petitions and affidavits, and upon said report, petitions and affidavits, the following motions and petitions were heard :

First. The motion of Carmichael, filed March 14, 1870, to satisfy the decree and dismiss the suit.

Second. Motion of Carmichael, of 16th of July, for the payment of the money due the Connecticut Mutual Life Insurance Company, according to the prayer of his petition to that effect.

Third. Motion of Bishop, receiver, under his petition of March 14, to satisfy the decree as to the petitioner, and to compel Carmichael to produce and cancel his notes, mortgages and securities.

Fourth. Petition by Bishop, filed June 11th, 1870, praying that, on ordering satisfaction of the decrees herein, by reason of the payments heretofore made into court on the 14th day of March, 1870, that the court bar the right of Starr to purchase *pendente lite*, and that the title of the Artesian Well Company be not affected by it.

Fifth. Petition of the Northwestern Manufacturing Company to withdraw the amount of its lien from the money in court, and offering to satisfy the decree.

And the following order of the court was entered July 20, 1870 :

"It is ordered by the court, that the sum due the petitioner, the Northwestern Manufacturing Company, upon the decree rendered herein at the February term, 1868, for \$1950, with 6 per cent interest to March 14, 1870, and costs of the petitioner, be paid from the money paid by Henry W. Bishop, as receiver of the Chicago Artesian Well Company, to the clerk of this court on the 14th of March, 1870, and that the same be, and is, hereby declared a full satisfaction of the decree aforesaid ; and the court overrules the motion to compel the defendants, the Connecticut Mutual Life Insurance Company, and George S. Carmichael to receive the money referred to in

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the petition of the said receiver filed March 14, 1870, in satisfaction of their debts referred to in said decree, and refuses to enter any order with reference to said Mutual Insurance Company and Carmichael, to which decision of the court, in overruling the motion and refusing to enter any order with reference thereto, the Chicago Artesian Well Company, by its receiver's solicitors, excepted."

And the court overruled the motion of the defendant George S. Carmichael, and refused to grant the prayer of his petition filed on the 16th day of July, 1870, to which decision the said defendant, George S. Carmichael, by his solicitors, excepted.

And thereupon, the Chicago Artesian Well Company, by its receiver, moved for a rule on the defendants to a cross bill, filed January 28, 1870, to answer the same, and for summons against James E. Starr, which motion the court refused.

And the court further ordered the clerk to refund the sum of \$2300 to George S. Carmichael, paid by him to the clerk, March 14, 1870, to which no objection was made.

And thereupon, the Artesian Well Company, by its receiver aforesaid, prayed an appeal to the Supreme Court of this State, from the order and judgment of the court below.

The Northwestern Manufacturing Company, the petitioner in this case, to enforce a mechanic's lien, has received the amount of its claim. The Connecticut Mutual Life Insurance Company has parted with its mortgage to Carmichael; so that the parties in interest in this suit have become reduced to the Artesian Well Company and George S. Carmichael.

The amounts of the two mortgages of the Connecticut Mutual Life Insurance Company, and of Carmichael, have been brought into court for him, but he declines to receive the amount of his own mortgage, for the reason that, since the rendition of the decree of sale in this case, he has himself proceeded under a power of sale given to him in the mortgage, and sold the property to James E. Starr, and has no further claim upon it, in this respect; and the matter in controversy in the suit, has really become narrowed down to the point,

whether the validity of Starr's title so acquired shall be tested in this suit, or in another one, to be subsequently commenced.

And it is only the action of the court below, in respect to the cross bill filed against Carmichael and Starr, that we shall consider. And in doing so, we wish to abstain from the expression of any opinion as to the sufficiency of Starr's title, leaving that to be adjudged upon the cross bill.

The position is taken that, on the payment of the petitioner's claim, the suit was at an end, and the court had no further power or jurisdiction in the case—that the matter of the cross bill was not germane to the subject matter of the original suit—and that it was filed and action asked under it at too late a stage of the proceedings.

The payment of the petitioner's claim and costs, it is true, was the attainment of the object of its suit, but it does not follow that the court had no power after that to determine questions between co-defendants. They were still before the court, not necessarily dismissed from it by such payment of the petitioner's decree, and the bill had not been dismissed. The Artesian Well Company and Carmichael were both properly made defendants in the petition, the one as owner of the fee, and the other as mortgagee of it; and the validity and amount of Carmichael's mortgage had been ascertained and fixed by the decree of the court to the end that, in case of the sale of the premises, for the satisfaction of the petitioner's lien, Carmichael, as mortgagee, might receive his share of the proceeds of the sale. If, during the progress of these proceedings in court, Carmichael, as claimed, undertook to foreclose his mortgage himself, and, as is claimed, by an unfair exercise of the power of sale given in it, made an irregular and void sale of the mortgaged premises to Starr, the appropriate occasion for the correction of such irregularity would seem to be in the same proceeding, so long as the parties were yet before the court.

The subject of the cross bill is a proceeding detrimental to the interests of the mortgagor, which has been had by the

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mortgagee, in respect to the mortgage and mortgaged premises, since they were brought before the court for its action upon them, by the original bill; and it is no foreign matter, but directly connected with the subject matter of the original suit, and there is no ground for the claim, that it is not germane to the subject of that suit because it is something which does not affect the interest of the petitioner itself, in the suit.

The interests of defendants, so brought into court, are entitled to regard, and should not be denied protection. It should not be made a serious objection to this cross bill, that it was filed *after final decree*, when the final decree was rendered February 18, 1868, and the matter complained of in the cross bill did not take place until January 5, 1870.

The cross bill does not seek to open that decree, nor to disturb any proceeding which has been had in the suit. Its sole purpose is to set aside a sale of the property made to Starr.

The rules of chancery practice referred to, as to the proper time of filing a cross bill, to entitle it to be heard with the original bill, and that a defendant can not, after unnecessary delay, by interposing a cross bill, postpone the hearing of the original cause, seem to have little pertinency to this case, because the petitioner has obtained its satisfaction, and can not be delayed; and rules adopted to prevent delay do not apply here. In a case so circumstanced as the one before us, it ought never to be too late to file such a cross bill, so long as the court has control of the cause.

At the time the motion for a rule to answer the cross bill, and for an order for process upon it, were made, the money was on deposit for the payment of the mortgage liens, so that the parties could be put to no wrongful delay in obtaining what was actually due them; and the award of costs being discretionary with the court, no reason is perceived why the inquiry into the validity of the sale to Starr might not be had upon the cross bill as well as in any other way. A sale *pendente lite* is a sale with notice of the suit, and the purchaser

takes his title subject to whatever decree may be made in relation to the property in that suit. To give the Artesian Well Company the full benefit of that rule, as against innocent purchasers from Starr, it may be important that the inquiry as to the validity of Starr's title, should be had in the present suit.

As to the cross bill being filed without authority, two affidavits to that effect appear to have been filed February 14, 1870, but no action of the court appears to have been asked or had upon them, or in view of them; and we can attach to them no significance.

The cross bill was filed January 28, 1870—it asked for a summons to Starr. On filing the bill, it was the duty of the clerk, under the statute, to issue the summons.

The next step as to Carmichael, was, on his part, to answer the bill. When, on the 20th day of July, 1870, the Artesian Well Company moved for a rule on Carmichael to answer the cross bill, and for a summons to Starr, the motion should have been granted. The appellant was entitled to have his cross bill acted upon by the court. And we do not regard the action of the court in refusing to do so, as merely discretionary. It was unnecessary to except to the ruling of the court. The rules of chancery practice do not require that exceptions should be taken to the various decisions of the court made in the progress of the cause. *Smith v. Newland*, 40 Ill. 101.

So much of the order of the Superior Court as refused the motion for a rule to answer the cross bill, and for a summons to Starr, is reversed, and the cause is remanded for further proceedings, in conformity herewith.

Decree reversed in part.

LAWRENCE, C. J., and SCOTT, J., dissent.

JOHN C. RUE *et al.*

v.

THE CITY OF CHICAGO.

SPECIAL ASSESSMENT—*certificate of publication.* The certificate of publication of the commissioner's notice of making a special assessment in the city of Chicago, is fatally defective if it omit to state the date of the first and last papers containing such notice, or language equivalent thereto.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. BARKER & TULEY, for the appellants.

Mr. S. A. IRVIN, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This is an appeal from the judgment of the Superior Court of Chicago, for a special assessment for filling, paving, &c., of Jefferson street, from West Van Buren street to Randolph street, in the city of Chicago.

There is one fatal defect in the proceedings, for which the judgment must be reversed. The certificate of publication of the commissioner's notice of the assessment, is as follows:

"This certifies that the appended assessment notice has been published in the *Chicago Republican*, the corporation newspaper of the city of Chicago, county of Cook and State of Illinois, six days consecutively, (excepting Sundays and holidays,) commencing with September 24, 1868."

"GEO. WILLISTON, Publisher."

The statute requires the certificate to state the number of times which the notice shall have been published, and the dates of the first and last papers containing the same. No particular language is requisite to a compliance with the statute,

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providing the certificate contain such dates and facts as that the court can determine from them the dates of the first and last papers containing the notice.

If we can determine by this certificate the date of the first paper, we certainly can not that of the last, because we can not know how many, or what days, the publisher regarded as holidays.

The questions as to what defenses may be made, upon an application for judgment upon the collector's report, are discussed and decided in the case of *Creote v. The City of Chicago*. 56 Ill. 422.

The judgment must be reversed and the cause remanded.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
HARMON SPRUANCE *et al.*

v.

THE CHICAGO & NORTHWESTERN RAILWAY CO.

1. RAILROADS—*of the right of others to connect their side-tracks with a railroad.* By the rules of the common law, railroad companies can not be compelled to permit individuals to connect side-tracks of their own, with the tracks of the companies, in order to enable the latter to carry grain to warehouses or elevators which have been erected off their lines of road.

2. SAME—*avermment of a custom in that regard* And where it is sought to compel a railroad company to permit such connection, upon the ground of an alleged custom among the companies whose lines concentrate at the place indicated, the custom must be made clearly to appear, and to have existed so long as to have the force of law.

3. LESSEE—*whether a contract passes to him.* The owner of a lot of ground in the city of Chicago, having erected a grain elevator thereon, was permitted, by contract with a railroad company, to connect a side-track, extending from his elevator to the company's line, with its track. So far as appeared, the contract was purely personal, and in no way attached to

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the realty: *Held*, a subsequent lessee of the elevator did not succeed to any of the rights of his lessor, in respect to such contract.

4. *SAME—of rights granted to the lessor by ordinance of the city.* Where the city had, by ordinance, granted to the lessor the privilege of laying down a track along one of its streets, in order that he might connect his elevator with the line of a railroad, such grant of authority being made specially to the lessor, the mere leasing of his elevator to a third person would not operate to pass to the lessee any of the rights secured to the lessor under the ordinance.

APPEAL from the Superior Court of Chicago.

Messrs. GOUDY & CHANDLER, for the appellants.

Mr. JOHN N. JEWETT and Mr. JAMES H. HOWE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding by mandamus, on the part of appellants, in the Superior Court of Chicago, against appellees. The object of the proceeding was, to compel the railroad company to permit the junction of a railway track from the grain elevator of appellants, with the main track of appellee's road, and when thus connected, to compel the company to deliver at the warehouse all grain shipped to it, for storage. The writ avers, that the warehouse was erected by Maher and Newberry in the year 1862, on land then, and now, owned by Maher; that the elevator is a public warehouse for the storage of grain; that the railway company, under an ordinance of the city, laid and constructed their railway tracks from the western limits of the city along Kinzie street, across the north branch of the Chicago river, and thence along North Water street to the lake shore.

It is averred, on the belief of the relators, that before the warehouse was erected, an agreement was made between the Galena & Chicago Union Railroad Company (which was subsequently consolidated with appellees' company) and Maher,

that a switch might be placed in their track, and a road run thence to the warehouse, which was intended to enable freight cars to pass from their main track to the warehouse, and there discharge grain shipped to it for storage; and that Maher and Newberry obtained a license to make such connection, from the city, by an ordinance duly adopted; and, thereupon, one Hiram Wheeler obtained, by lease of Maher, his interest in this elevator, and he thereupon constructed a railroad track from the main line of the company to the warehouse, and the company from that time used the same, and run their cars to the elevator, and there discharged such grain as was consigned to it for storage; that some time during the year 1865, Wheeler ceased to have any interest in this warehouse, and the railroad company thence refused to deliver grain at that warehouse; that about a year afterwards, Wheeler, who had control of a portion of the ground over which this track run, compelled its removal, and the connection was thus broken with the consent of the company; that appellants became the lessees of the warehouse in August, 1869; that they had complied with the ordinance of the city so as to acquire the right to construct a track from the warehouse to the main track of the company, and applied to the company to connect the same with their road, and that they would carry to, and deliver, such grain as might be consigned to it for storage, but the company had refused, and still refuse; that appellees have railroad connections with a number of other warehouses at which they deliver grain, and that this and other companies running into Chicago do not have the necessary facilities for storing grain, but depend upon private enterprise for the purpose; that it is the custom and usage of all such railroads to use such connecting tracks to deliver grain at various elevators in the city, and that this road unlawfully discriminates against appellants in refusing to deliver grain at their warehouse, or in not permitting them to form such a connection with their road as would render it easy and convenient to thus deliver grain.

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It is also averred, that such unlawful discrimination is induced by a contract entered into by the company with other warehousemen, only to deliver grain transported over their roads to the warehouses of such parties.

It is averred, that relators have no adequate remedy at law, and it concludes with a prayer that the railroad company be compelled to permit them to construct a track, connecting their warehouse with the railroad, by a switch, and then to carry and deliver to them all grain that may be consigned to their warehouse for storage.

To this writ, appellees demurred, and it was sustained by the court, and a judgment was rendered in favor of the company. To reverse the judgment, relators have brought the record to this court by appeal, and assign for error the sustaining of the demurrer to the writ.

In the case of *Vincent v. Chicago & Alton Railroad Co.* 49 Ill. 33, it was held that: "A railway company can, unquestionably, refuse to allow the owner of adjacent property to lay down a side-track connecting with its own rails." Appellants admit, that, under the rules of the common law, this company could not be compelled to permit appellants to unite their track with that of the company, but they insist, that the railroads entering Chicago, having established a custom whereby all public warehouses have been permitted to make such a connection, and grain having been, by them, delivered in bulk into such warehouses, it therefore follows that appellees can not make a discrimination between the different warehouses.

The averments of the writ do not bear the construction that this company had permitted the owners of all other elevators to thus connect with their road; nor does it appear that all are so connected. But even had it been averred, that all warehouses in the city, except that of appellants, were so connected, still there is no averment of the terms or conditions upon which the connections had been made. And it certainly fails to appear that it had been, or was the usage, that such warehouses might be thus brought in connection with this or

other roads, without the consent of the companies ; and in the absence of such an averment, we would not presume such a custom to exist. Even if such an averment had been made, we are not prepared to hold that such a usage, for so short a period, would have acquired the force and effect of a law, repealing or abrogating their common law right to refuse. Customs that obtain the force of laws, are not thus readily obtained. We are, therefore, clearly of opinion, that under the rules of the common law, or under the custom averred in the writ, we have no power to compel this connection, without the consent of appellees.

It is likewise insisted, that as it is averred and admitted by the demurrer, that in 1862 appellees agreed with Maher and Newberry to allow such a connection, relators have, thereby, the same right. There is no pretense that the company ever entered into such an agreement with relators. If such an agreement was ever made, so far as we can see, it was entirely personal with them, and there is no averment which shows relators to have succeeded to the covenants of the agreement, if it contained any, or in what manner they claim, under a personal agreement of these other parties. We presume it was like ordinary contracts entered into by parties, which do, and can, only bind the parties who enter into them. The agreement averred to have been made, in nowise appears to have, in the slightest degree, attached to the real estate on which the elevator is located, and if not, these lessees of the property have succeeded to no right to claim the enforcement of the contract ; that belongs to Maher and Newberry, if a breach has occurred on the part of the company, and their remedy would, in such a case, be complete by the appropriate action at law.

It appears Wheeler had control of a portion of the ground over which the side track formerly ran, and it is averred that he compelled the removal of that portion of the track. Being the owner, or having some other power to control it, we must presume he acted according to his legal rights in compelling

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its removal. If he did not have the legal right, it is not probable those having the right to the use of the track would have submitted to its discontinuance. But that was a different track from the one sought to be constructed, made by other parties for their (and not appellants') convenience or interest. And not only so, but the removal of the track had occurred some years before appellants leased these premises, and they took the property as it was then situated; and we have seen that this, or the other track, was not appurtenant to the property.

Again, the authority conferred by the ordinance was to Newberry and his partners, to lay the track over the streets named; it was a special authority to them. It was not to them and their assigns, but to them personally; and relators have not shown they were a portion of the persons who formed the firm of Newberry & Co., to whom the special privilege was given, nor do we understand from the record how relators have, in any manner, succeeded to their rights.

From a careful examination of this record, and the arguments of counsel, we are unable to perceive any error in this record, and the judgment of the court below is therefore affirmed.

Judgment affirmed.

LYMAN SANDERSON

v.

THE CITY OF LASALLE.

1. TAXES—*return of the assessment—must be within the time prescribed.*
An ordinance of the city of LaSalle, prescribing the manner of assessing property for taxation in the city, provided that the assessment should be

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completed and returned to the city clerk's office by a certain day, and thereupon the clerk should give notice that objections thereto would be heard by the city council on a day designated in the ordinance: *Held*, this requirement to return the assessment by a given day, was not simply directory to the assessor, but was mandatory, and its performance indispensable to the validity of the assessment.

2. So, upon an application for a judgment against certain delinquent lots in that city, for taxes, the objection that the assessment was not returned within the time prescribed in the ordinance, was fatal to the application.

3. *SAME—effect of act of 1853, amendatory of the revenue law.* Nor did the act of 1853, which provided that the failure to return the assessment in time should not vitiate, cure the omission in this case, as that act had no relation to assessments for corporate purposes,—they are regulated by the revenue law of the municipality.

APPEAL from the County Court of LaSalle county; the Hon. C. H. GILMAN, Judge, presiding.

Messrs. CRAWFORD & BECK, and Mr. C. S. MILLER, for the appellant.

Mr. H. D. FOLLETT, City Attorney, and Mr. E. F. BULL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The appellee, the city of LaSalle, applied to the county court of LaSalle county for a judgment against certain delinquent lots in that city, for the general and special taxes assessed for the city thereon, for the year 1869, and for the taxes of the previous year.

Judgment was rendered against appellant's lot, against his objections then and there made, from which he appeals. We deem it necessary to consider only the 12th objection, as, disposing of that, disposes of the whole case.

The objection is, that the assessor's book was not returned to the clerk of the city on or before the 15th day of July, as provided by the ordinance of the city.

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By sec. 8 of an ordinance, prescribing the manner of assessing property for taxation in the city of LaSalle, it is provided, the assessor shall finish and complete the assessment on or before the 15th day of July in each year, and shall add up, extend, certify and sign the same, and make return thereof to the clerk of the city on or before the day above named, in each year; and the city clerk shall, thereupon, immediately give notice by two publications in a weekly newspaper published in the city of LaSalle, that the assessment list for the year therein stated has been returned to him by the assessor, and is subject to the inspection of any person interested; and that, on the first Tuesday of the month of August following, at two o'clock P. M., the city council will sit as a court of appeal from said assessment, when all persons will be heard who feel themselves aggrieved by the assessment of their property; and the city council may approve, reduce, increase, alter, correct or amend such assessment, as in their opinion shall be proper and just.

It is not contended by appellee, that this ordinance is not within the chartered powers of the city. It is conceded to be, and as such, it is the law of the case, to the same extent that an act of the legislature would be, on a subject within their constitutional powers.

Appellee, however, insists that under the authority of the case of the *City of Ottawa v. Macy et al.* 20 Ill. 413, this provision being a part of an ordinance only, and not of the charter, that it is simply directory, and consequently not fatal. That case has no resemblance to the one before us. Here, the complaint is, that the assessment was not returned at the time required by law; there, the objection was, that the collector had not returned his warrant in thirty days as required by the ordinance. By sec. 9 of that ordinance, it was the duty of the commissioners, when they had completed the assessment, to file the same in the office of the city clerk within forty days after their appraisal, unless further time should be given them for the purpose; and the clerk was required to give

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notice of such return, for six days, in the corporation paper, requiring persons wishing to appeal from the assessment, to file their objections by a certain day, at which time the city council would hear all objections to the assessment, and revise and confirm, or amend the same.

This was designed for the protection of property owners, and if omitted, would doubtless have invalidated the proceedings ; but the requirement of the collector to return the warrant in thirty days, was for the benefit of the city council, and not necessarily mandatory, as no property owner could be injuriously affected by a failure of the collector to comply strictly with the requirement.

This case is very different, and is strongly put by this court in *Marsh v. Chesnut*, 14 Ill. 223, where the legislature makes it the imperative duty of an assessor to complete an assessment, and return the same to a particular place on or before a certain day, as in this case. It was there held, that the duty can not be dispensed with, without the consent of the party taxed, and the assessment is thereby invalid as against the owner of the land. The object of this provision in the revenue law, is identical with that of the ordinance, to afford the owner ample time and opportunity to ascertain the valuation put upon his property by the assessor, and if deemed excessive, that he may make application to the proper authority for a correction of the error. It was the intention of the law, in both cases, that some time should intervene the return of the assessment and the sitting of the tribunal having the power to revise the doings of the assessor. This interval of time is allowed the owner, the court say, to inspect the return, and prepare for the hearing of his objections to the assessment. This requisition of the statute is clearly imperative ; it is made for the benefit of the owner, and can not be dispensed with without his consent. A failure to observe it may seriously injure him. The courts have no power to declare it directory merely ; such a decision would virtually deprive a party of the protection the legislature designed to afford him. The

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court further say, "We have no doubt, this direction to the assessor was intended to be compulsory, and that a failure by him to comply with it, renders the assessment invalid as against the owner of the land."

In conclusion, it is further said: It is a sound and inflexible rule of law, that when special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, every material provision of the statute must be complied with. The owner has the right to insist upon a strict performance of all the material requirements, and especially of those designed for his security, and the non-observance of which may operate to his prejudice. On this principle alone, the direction to the assessor to make his return by a given day, is compulsory, and its performance is indispensable to the validity of the assessment. Without a valid assessment, the subsequent proceedings necessarily fall, for the want of a basis on which to rest.

With equal force and propriety, may these views be urged in this case; no difference in principle is perceived in the cases.

But it is contended by appellee, this omission is cured by the act of 1853, amending the general revenue law of the State, providing as it does, that the failure to return the assessment in time, shall not vitiate.

It will be observed, the act cited relates in no manner to assessments for corporate purposes; they are regulated by the revenue law of the municipality. No provision like this, in the general law, has been incorporated into the ordinance, nor is it to be found in the charter of the city. The case, then, stands upon the 8th section of the ordinance cited above, and the provision therein, requiring the return of the assessment to be made on or before the day named therein, is, for the reasons given in *Marsh v. Chesnut*, *supra*, of an imperative and mandatory character, and not having been complied with, the assessment is necessarily invalidated.

For the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

LUCIUS M. DART

v.

CHRISTOPHER HERCULES *et al.*57 446
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1. **PURCHASER from swamp land commissioner—must know his authority.** The authority of a swamp land commissioner, as agent of a county holding such lands, being a matter of law and public record, a purchaser from such commissioner will be presumed to know the extent of the agent's authority in the premises.

2. **SWAMP LAND COMMISSIONER—of his powers.** A swamp land commissioner has no authority to declare a forfeiture of a contract respecting a sale of swamp lands belonging to a county,—that power rests alone, in counties under township organization, in the board of supervisors.

3. **AGENT—exceeding his authority—whether principal bound.** It is a general rule, that if a special agent, whose authority is conferred by statute or orders of court, acting in the capacity of a public officer, with limited and well defined powers, acts outside of the authority conferred, the principal will not be bound by his acts.

4. **SUBSEQUENT PURCHASER, with notice of the prior sale—who may declare a forfeiture.** A subsequent purchaser of land, with notice of the prior sale, will hold subject to all the rights of the first purchaser; and though the prior purchaser may be in default so that his vendor would be entitled to declare a forfeiture of his contract, at his option, yet that would not avail the subsequent purchaser, the vendor having the sole right to exercise such option.

5. **SAME—of improvements made by subsequent purchaser with notice.** If a subsequent purchaser, with knowledge of the prior equities of the first purchaser, make improvements on the premises, he will be regarded as having done so in his own wrong, and it will not avail him as against the prior purchaser, or those claiming under him.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

Messrs. CLARK & FOSDICK, for the appellant.

Mr. N. J. PILLSBURY, and Mr. A. E. HARDING, for the appellees.

Opinion of the Court.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This was a bill in chancery, exhibited by the appellant in the circuit court of Woodford county, to enforce the specific performance of an alleged verbal agreement on the part of the county of Livingston, to sell to him a certain tract of land described in the original and the amended bills, and to enjoin an ejectment suit then pending and undetermined in said court, for a part of said tract of land, commenced by the appellee Hercules, against the terre-tenants of appellant.

The appellant alleges in his amended bill, that in May, 1859, he applied to Woolverton, the agent and commissioner for the county, to purchase the northeast quarter of sec. 18, town 27 north, range 8 east, and that the agent, by a verbal contract, sold him the land for the sum of \$5 per acre, on the terms proposed by the county for the sale of swamp lands, and the appellant set out the conditions of the verbal contract as follows :

“ On condition that he do the drainage necessary to reclaim the land at his own expense, over and above said price, within five years from the date thereof, to the satisfaction of the supervisors of said county ; and that he improve, by cultivation or enclosure, one-half thereof within said five years, and to improve at least one-tenth part yearly until one-half thereof shall be improved to the satisfaction of said board of supervisors.”

It is further alleged, that the appellant had borrowed the principal sum to be paid for the land, for five years, for the use of which he was to pay interest at the rate of five per cent per annum, interest to be paid annually, in advance. It is further alleged that, at the time of the making of the alleged contract, Woolverton was at his residence, and not at his office or place of business, and that it was then and there expressly agreed by both parties that appellant was to take immediate possession of said tract of land, and at once commence to improve the same, and to return in 60 days from that date and

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pay to said agent, for the use of said county, the sum of five per cent interest for one year on the purchase money, and that then appellant was to receive a contract in writing for the conveyance of said land to him.

It appears that after the making of the alleged contract by the appellant with the county, at the rate of \$5 per acre, the board of supervisors, by an order entered of record, reduced the price of all swamp lands, and the appellant now insists that he is entitled to the benefit of such reduction on the lands, which he alleges he purchased of the county, and for that reason does not tender with his bill the price that he said he agreed to pay for the land, but tenders only the reduced price fixed by the late order of the board of supervisors.

The answer denies all the material allegations of the bill, and insists that the contract, if any was made, was within the statute of frauds, and therefore void. On the hearing, the bill was dismissed, and appellant brings the cause to this court by appeal.

It appears that before appellant applied to the county agent to purchase the tract of land in controversy, it had been sold to one Delos W. Hunt, and a certificate of purchase had been given to him under the rules and regulations established by the county court for the sale of swamp lands belonging to the county. This fact was known to the appellant when he applied to Woolverton, the agent of the county, to purchase the land. But he insists that the county agent then told him that Hunt had forfeited his contract, and that he agreed to sell him the land by a verbal contract, and directed him to go and take possession of the land, and to return within 60 days and he would execute to him the usual certificate of purchase. This is denied by the agent, Woolverton, but there is some evidence that strengthens the testimony of the appellant in regard to the contract. But if it be conceded that the agent did tell appellant that Hunt had forfeited his contract, we apprehend the county would be in no way bound by the declaration. Woolverton was only a ministerial

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agent of the board of supervisors, a special agent of the county for the sale of these particular lands, with limited and well defined powers. He had no other powers than such as were conferred by the statute and the orders of the county court. The authority being a matter of law and public record, it may be presumed that the appellant knew the extent of the agent's authority in the premises. *Denning v. Smith*, 3 Johns. Chy. 332; *Marshall County v. Cook*, 38 Ill. 44.

The agent was not invested with power to declare the land contracts forfeited. That power rested alone in the board of supervisors. *The Board of Supervisors v. Henneberry*, 41 Ill. 179.

The board of supervisors had never, previous to the date of making the alleged contract, by any order, declared the contract of Hunt forfeited, or even intimated any intention to do so. In the absence of any action on the part of the board declaring the Hunt contract forfeited, the agent had no authority to do so, and his declaration to that effect was beyond the powers conferred on him. It is a general rule that, if a special agent, whose authority is conferred by statute or orders of court, acting in the capacity of a public officer, with limited and well defined powers, acts outside of the authority conferred, the principal will not be bound by his acts. *Keys v. Wesford*, 17 Pick. 273; *Nixon v. Hyersott*, 5 Johns. 58.

It does not appear that the county ever declared the Hunt contract forfeited, or ever manifested any intention so to do. The appellant, at the time of making his alleged contract, had notice of the Hunt sale, and of the rights acquired under that contract. We do not see, therefore, what rights the appellant could acquire under his alleged contract as against the prior rights of Hunt and his assignee. If he acquired any rights under the alleged contract, he must be held to have acquired the same under and subject to all the rights and equities of the former purchaser and his assignee.

The appellant insists that Hunt did not comply with his contract with the county, and therefore that neither Hunt nor

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his assignee could acquire any rights under it. That is not a question about which he can concern himself. It is the province of the county to determine whether Hunt had complied with the terms of his contract, or whether they would insist on a literal compliance before they will execute the contract.

Before the appellant returned on the 20th of June, 1859, to complete his verbal contract, as he alleges he made it with Woolverton, the appellee Hercules, had presented to the agent the certificate of purchase issued to Hunt, duly assigned to him, on which the agent issued a new certificate to Hercules, and so advised the appellant. This was before the appellant had paid any money, or offered to pay anything, under the alleged verbal contract.

The board of supervisors have always recognized the rights of the appellee Hercules, as assignee of Hunt, and have steadily repudiated the alleged contract insisted upon by the appellant. In pursuance of the certificate of purchase, the board of supervisors caused a deed to be executed and delivered to Hercules for one-quarter of the quarter section.

It must be held, therefore, that if appellant made improvements on the premises, he did so in his own wrong, for he had full knowledge of the prior equities of appellee in the lands, and that the county recognized his equities, and did not insist upon a forfeiture of the Hunt contract. The agent, Woolverton, had no authority whatever to make a contract with the appellant for the land while the contract of Hunt was outstanding. The existence of that contract was fully known to appellant at the time of making the alleged verbal contract. The appellant had no right to presume that the Hunt contract was or would be declared forfeited by the county. In fact, the board of supervisors never did declare the Hunt contract forfeited, but, on the contrary, have always recognized it as being in full force. This view of the law will render it unnecessary to discuss the other questions raised by the counsel on the record, even if it be admitted that the appellant made the verbal contract, as alleged. The agent's authority

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was to be found in the statute and in the records of the county court, and from them the appellant could know, and is presumed to have known, that the agent had no power to make the contract insisted upon. We are, therefore, of opinion that the appellant acquired no rights under his alleged contract that he could assert against Hunt, the former purchaser, or any one holding under him.

The decree in the circuit court dismissing the bill will be affirmed.

Decree affirmed.

FRANK STURGES *et al.*

v.

SAMUEL L KEITH.

1. **BANKER**—*liability for special deposit.* If a sole party, as a banker, receive stock or coin upon special deposit, and it be embezzled by his own clerk or cashier, then, although that would be a wrongful conversion of the property, still it would not be the act of the banker, nor would he be liable for such conversion, unless he participated in it, or was guilty of gross negligence, and the same rule would apply in case of a firm of bankers.

2. **TROVER**—*demand of an agent.* If stocks be delivered to the agent of a banking firm, as a special deposit in their bank, and subsequently a portion of the members of the firm withdraw, the former agent of the firm will thereupon cease to be the agent of the retiring members, so that upon an action of trover being brought, after the dissolution, against all the original partners, for an alleged conversion of the stocks, a demand upon the agent will not afford *prima facie* evidence of conversion as against those who had previously withdrawn.

3. **TROVER**—*whether it will lie.* A conversion is a positive, tortious act; mere *nonfeasance* or neglect of some legal duty will not suffice to support trover, although it may constitute sufficient ground to maintain an action on the case.

4. So if a party be authorized by power of attorney to sell certain stocks, and the agent violate the instructions, or in any manner abuse his authority

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to the injury of his principal, his wrongful acts in that regard will not constitute a conversion so as to support an action of trover, but the remedy would be an action on the case for such abuse.

5. *SAME—evidence in rebuttal as to conversion.* In an action of trover for an alleged conversion of property, proof that the defendant sold the property under a power of attorney would rebut the *prima facie* case made for the plaintiff by a demand and refusal.

6. *PAROL EVIDENCE—to vary the terms of a power of attorney.* Where an agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and parol evidence is not admissible to vary or contradict it.

7. *MEASURE OF DAMAGES—in trover, for the conversion of railway stocks.* The rule in this State is, that the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion, with interest from that time until the trial, and no exception is recognized where the property converted happens to be stocks.

8. *SAME—as to the time of estimating value.* Where the demand and refusal either constitute the conversion, or afford presumptive evidence of it, it is no infringement of this rule to regard *that* as the time for estimating the value.

9. *SAME—of evidence admissible to fix value.* In an action of trover to recover for the alleged conversion of certain railroad stock, it was held to be competent for the plaintiff to give evidence tending to show that the railroad company was about to, and did, increase the stock, and that owners of stock were, by its regulations, to have a certain *pro rata* of the new stock at reduced rates,—not to enable the plaintiff to recover the value of the new stock as special damages, but as being a circumstance which would legitimately bear upon the question of the value of the stock converted.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Messrs. WALKER & DEXTER, and Messrs. HIGGINS, SWETT & QUIGG, for the appellants.

Messrs. BECKWITH, AYER & KALES, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was an action of trover, brought in the circuit court of Cook county, by appellee against appellants, to recover for

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the alleged wrongful conversion of 250 shares of the common stock of the Chicago & Alton Railroad Company.

It appears from the evidence, that, in May, 1864, the appellants, Frank Sturges, Albert Sturges, George Sturges, Buckingham Sturges and Shelton Sturges, were engaged as co-partners in the business of banking, under the firm name of Solomon Sturges' Sons; that the appellant William Sturges, was not a member of the firm, but a managing agent thereof; that appellee, being a customer of this banking house, and himself and partner being indebted to the same in the sum of about \$13,000, upon a gold transaction, in the month of May aforesaid, brought to the bank certificates for 250 shares of the above mentioned stock, and by an arrangement conducted exclusively between him and William Sturges, the stock was left in the bank, but whether as security for the indebtedness of appellee and partner to this banking house, or merely for safe keeping, is a fact as to which the evidence of the parties is conflicting. It, however, does appear, that at the time of leaving the stock and closing the arrangement in reference to it, appellee executed a power of attorney to the Sturges last named, authorizing him to sell and transfer the stock, and there is nothing in this record which discloses that appellee ever attempted, by any express act of revocation, or by giving instructions inconsistent with such power of attorney, to revoke the same, until about the 22d day of March, 1866, when he caused a demand in writing, for the return of the stock to him, to be served upon said William, and in July next thereafter commenced this suit against all the parties above named, for the wrongful conversion of the stock.

It further appears, by the evidence in the case, that in September, 1864, Albert and Buckingham Sturges bought out the other members of the firm, the latter then retiring therefrom, and the former continuing the business. And also that in the latter part of January, 1865, William Sturges sold the stock in question; but it does not appear that any of the other defendants participated in the act, either by previous command

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or subsequent ratification, except the mere fact that the transaction was entered in the books of the firm, then composed of Albert and Buckingham Sturges only.

The court below instructed the jury, on behalf of appellee, that, "if the plaintiff was the owner of 250 shares of the stock of the Chicago & Alton Railway Co., and deposited the same with the agent of the defendants in the usual course of business, either as a special deposit for safe keeping, or as collateral security for an indebtedness, and such deposit was known to the defendants, the law implied a duty on their part to safely keep the stock; and if the jury further believe, from the evidence, that said stock has been wrongfully converted, then the defendants are liable in this action, and no one of the defendants can shield himself from liability by reason of his withdrawal from the firm after said stock was deposited with their agent."

This instruction was wrong, and well calculated to mislead the jury. It is not only obnoxious to criticism, in that it did not require the jury to find that the stock was deposited with the agent of the defendants, as such, or on their behalf, but it is based upon a misconception of the law, both of bailment and partnership, as well as of the action of trover. The fair import of the instruction is, and the jury must have so understood it, that if the stock was left with the agent of the defendants as a special deposit, and they knew it, then they became so far insurers of its safety (though without compensation) that if it was afterwards wrongfully converted, no matter by whom or under what circumstances, still all of the members of the firm would be liable in trover, notwithstanding the dissolution of the firm before such conversion.

The difficulty with the proposition is, that if a sole party should, as a banker, receive stock or coin upon special deposit, and it should be embezzled by his own clerk or cashier, then, although that would be a wrongful conversion of the property, still it would not be the act of the banker, nor would he be liable for such conversion unless he participated in it, or was

guilty of gross negligence. Story on Bailments, sec. 88. If a sole party would not be liable under the circumstances supposed by the instruction, then, of course, several would not.

After the most diligent and careful examination of this record, we are satisfied that no cause of action in trover was shown, as to part of the defendants, at least.

The only demand that was made, was upon William Sturges, in March, 1866. He was not a member of the firm, but an agent. The stock was left with him in May, 1864, and in September of the same year the firm was dissolved, Frank, George and Shelton retiring from it, and Albert and Buckingham Sturges continuing the business. From the time of the dissolution, William ceased to be the agent of the retired members of the firm.

The demand upon him, therefore, would not afford *prima facie* evidence of conversion, as against those who had withdrawn.

It has been held that, where bailees of goods *are partners*, a demand upon and refusal by one, would be regarded as *prima facie* evidence of conversion by all. *Lloyd v. Bellis*, 37 Eng. L. and Eq. 545; *Holbrook et al. v. Wight*, 24 Wend. 168.

This rule springs from the partnership relation, and not from that of mere joint bailees; because, although there may be a joint contract of bailment, yet, in the absence of the partnership relation, a demand upon and refusal by one bailee will not afford *prima facie* evidence of conversion against the others. *Mitchell v. Williams*, 4 Hill, R. 13; *White v. Demary*, 2 New Hamp. R. 546; 2 Greenl. Ev. sec. 644.

While the partnership exists, it speaks and acts only by its several members, and, of course, when that existence ceases by the dissolution of the firm, the act of the individual member ceases to have that effect. 1 Greenl. Ev. sec. 112; 3 Kent's Com. 63.

It follows, as a necessary consequence, that a refusal upon demand, by one of the members of a firm, after its dissolution,

would not have the effect to bind the others. *Pattee v. Gilmore et al.* 18 New Hamp. R. 460.

So that if the demand had been made upon Albert and Buckingham Sturges in March, 1866, their refusal could have had no effect upon the others in charging them with a conversion, and much less would that of their agent.

If William Sturges had a power of attorney authorizing him to sell the stock, proof of the sale under it would rebut the *prima facie* case made by demand and refusal. It is true that it was not competent to prove the authority by parol. *McKinney v. Leacock*, 1 Serg. & R. 27; *Hovey v. Deane*, 13 Maine, 31; Dunlap's Paley on Ag. 310. The evidence was introduced on both sides without objection. Appellee was asked this question: "You did, then, execute a power of attorney, by authority of which he could sell the stock, couldn't he?" To which he answered: "Yes, sir, he could. I gave him the power." And if, according to appellee's own theory, the stock was not left as a pledge, it is difficult to see how trover could be maintained. If the agent did not obey instructions, he might be liable upon a special count in case; but a conversion is a positive, tortious act. Mere *nonfeasance*, or neglect of some legal duty, will not suffice to support trover, although it may constitute sufficient ground to maintain an action on the case.

It does not appear that the power of attorney was produced on the trial. If it had been, parol evidence would not have been admissible to vary or contradict it. When the agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and parol evidence is not admissible to vary or contradict it. Story on Ag. sec. 76.

Both parties treated it as if produced and subsisting at the time of the sale. If so, it would sustain a plea of leave and license, and the sale under it confer a good title upon the purchaser; which could not be the case, if William Sturges had

no authority to sell, and the sale was a tortious act. *Sarjeant v. Blunt*, 16 Johns. R. 74.

It was a license given by the party, not by the law. Where a license is given by the law, and the person acting under color of such authority, abuse it, the authority is gone, and he is a trespasser *ab initio*. Not so, as to one acting under authority given by a party. In the latter case, the abuse of it does not avoid the authority, but affords ground for an action on the case for such abuse. The subsequent conduct of the party was relied upon as establishing want of authority. The sale in violation of instructions, the fraudulent concealment of the fact, and failure to account, if such were the fact, would constitute a breach of trust, but would not avoid the power of attorney, if not revoked, and this record fails to show any attempt to revoke it until the demand made upon William Sturges, in March, 1866. Neither this demand and refusal, nor the misconduct of William Sturges subsequent to the sale, though with the privity and consent of his principals, Albert and Buckingham Sturges, could afford the slightest evidence of a wrongful conversion, against the retired partners. *Weymouth v. Boyer*, 1 Vesey, 424; *Palmer v. Jermaine*, 2 Mees. & Welb. 282; *Steirreld v. Holden*, 4 Barn. & Cres. 4; *Kelsey v. Griswold*, 6 Barb. 442; *Baltimore Ins. Co. v. Dalrymple*, 25 Md. R. 272.

The only other question discussed in this case, is the measure of damages, and the propriety of the instruction to the jury by the court below, on that subject, the substance of which was, that if the jury found the defendants guilty, then, inasmuch as the plaintiff had elected to take it, the measure of damages was the market value of the stock at the time of the trial, together with the cash dividends declared since February, 1865, and the jury were at liberty to allow interest on such dividends at the rate of six per cent per annum from the time of their respective payments by the railroad company.

It appears in the case that the stock was sold in January, 1865, for \$93 per share, which is claimed to have been its

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then market value. The demand was made for it by appellee in March, 1866. In July next thereafter this suit was commenced; but it was not tried until the October term, 1868, at which time the stock had advanced to \$151.50 per share. Under the instructions given, the jury found all the appellants guilty, and assessed appellee's damages at \$47,058.06, and must therefore have determined the value of the stock at the market price at the time of the trial.

Neither the last mentioned instruction nor any other, contained any hypothesis as to whether the suit had been brought within a reasonable time, or prosecuted with diligence, or whether from the evidence the conduct of appellants was fraudulent, or whether from the evidence there was good reason for believing that appellee procured the stock for a permanent investment, or would have kept it so as to have realized the price ruling at the time of the trial.

The rule of damages adopted, by the circuit court must, therefore, have excluded all consideration of punitive or exemplary damages, and have been based upon the sole idea of indemnity to appellee, and virtually declares that the bailor may bring his suit at any time within the period of the statute of limitations, and then, upon the arbitrary presumption of law, that he originally obtained the stock for a permanent investment, and would have kept it until the time of the trial, he is allowed to elect to take the price at that time as the measure of damages, thus making the measure of damages depend upon presumptions that may be against the fact—the circumstance of venue, and the strategy of movement as to the time of trial, instead of any fixed or definite rule.

In *Suydam v. Jenkins*, 3 Sandf. 626, the court, in an opinion delivered by Duer, J. and remarkable for its ability, research and thoroughness, says: "In trover, the general rule, both in England and the United States, undoubtedly is, that the current or market value of property at the time of conversion, with interest from that time until the trial, is the true measure of damages;" citing, in support of the proposition, a large

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number of cases, to which may be added: *Moody v. Whitney*, 38 Maine, 174; *Walker v. Borland*, 21 Mo. 289-294; *Baltimore M. Ins. Co. v. Dalrymple*, 25 Md. 272; *Park v. Boston*, 15 Pick. 198; Greenl. Ev. vol. 2, sec. 276; *id.* sec. 649; Sedg. on Dam. (marg. p.) 481; *Keaggy v. Hite*, 12 Ill. R. 99; *Otter v. Williams*, 21 *id.* 118; *Yates v. Mullin*, 24 Ind. R. 277.

There can be no doubt but that the rule adopted by the learned circuit judge was based upon a supposed exception to the general rule of damages, on account of the subject matter of the action being stocks. Such an exception to the general rule of damages in actions *ex contractu* was made in England as early as 1802, in the case of *Shepherd, executor, etc. v. Johnson*, 2 East, 211. This case was a writ of inquiry to assess damages on a bond given by the defendant, conditioned that his co-obligor should replace a certain quantity of stock which the testator had lent him, and which was to have been replaced on the 1st of August, 1799. By the general rule of damages, the recovery would have been for the market value at or about the day it should have been delivered. But because it was stock, an exception was made to this general rule; and the stock having advanced, the court held the market value at the time of the trial, was the proper rule of damages. Nothing short of that, it was thought, would afford complete indemnity to the plaintiff for the breach of the engagement, and thus this exception to the general rule originated from a ground merely conjectural and speculative, viz: that the plaintiff would have kept his stock so as to realize the price at the trial. From that time to 1824, the cases of *McArthur v. Seaforth*, 2 Taunt. 258, *Downs v. Back*, 1 Stark. R. 318, and *Harrison v. Harrison*, 1 Car. & P. 411, were decided, recognizing the same exception. In *Gainsford v. Carroll*, it was sought to apply the rule of the foregoing cases in an action of assumpsit for not delivering goods upon a particular day, but which had not been paid for; but the court said, "Those cases do not apply to the present. In the case of a loan of stock, the borrower

holds in his hands the money of the lender, and thereby prevents him from using it altogether."

But in *Greening v. Wilkinson*, 1 Car. & P. 623, (tried in 1825,) which was trover for East India Co's warrants for cotton, evidence was given that the cotton was worth six pence per pound on the day of the refusal to deliver it up, but at the time of the trial would be worth ten pence half penny.

For the defendant it was contended that, on the authority of the case of *Mercer v. Jones*, 3 Camp. 477, the damages should be the value at the time of the conversion; but for the plaintiff, that it must be the price at the time of the verdict, in the same way as damages for the non-performance of an agreement to replace stock.

ABBOTT, C. J., said the case of *Mercer v. Jones* was hardly law, and that the amount of damages is for the jury, who may give the value at the time of the conversion, or at any subsequent time, in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained.

Mercer v. Jones, *supra*, was trover for a bill of exchange, and Lord ELLENBOROUGH said: "In trover, the rule is that, the plaintiff is entitled to damages equal to the value of the article converted, at the time of the conversion," and directed a verdict for the amount of the bill and the interest up to the time of the conversion. Although ABBOTT, C. J., declared that this case was hardly law, yet, in *Keaggy v. Hite*, *supra*, which was trover for a note and mortgage, this court, in announcing the rule of damages, said: "The plaintiff, if entitled to recover at all, is entitled to a verdict for the full amount due upon the note and mortgage at the time of the conversion," and this rule, which was precisely the same as that laid down by Lord ELLENBOROUGH in *Mercer v. Jones*, *supra*, was again approved by this court in *Otter v. Williams*, *supra*.

It is true, that in the former case, Mr. Justice Trumbull, who delivered the opinion of the court, cited the case of *Cortelyou v. Lansing*, 2 Caines' Cases in Error, in support of the

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rule. It is difficult to understand why that case was cited for that purpose. That was an action of assumpsit, to recover the value of a depreciation note, which had been left with the defendant as a pledge for the security of a debt, but which had been wrongfully sold by the pledgee more than ten years before the demand and refusal. The court held that the demand and refusal did not show a cause of action, because the plaintiff did not show that, at the time of the demand, he was ready and willing to tender the amount of the debt; and citing the case of *Shepherd v. Johnson*, 2 East, approvingly, further held that, although the demand and refusal did not constitute or afford evidence of the cause of action, but that the sale of the note ten years before, did, yet the plaintiff was entitled to recover the value of the note at the time he chose to demand it. Though this case was decided twenty years before that of *Greening v. Wilkinson*, 1 Car. & P. *supra*, the rule of damages is the same as in the latter, and the latter repudiated that of *Mercer v. Jones*, which is the same this court adopted in *Keaggy v. Hite*, *supra*.

It is very manifest that this court, in the citation of *Cortelyou v. Lansing*, did not intend to adopt the rule of damages therein recognized.* Because the case in which it was cited was decided at the Mount Vernon term of December, 1850, and at the Springfield term in the same month, the case of *Smith et al. v. Dunlap*, 12 Ill. 184, was decided; and in the

* NOTE BY THE REPORTER :

On the argument of the case of *Barrow v. Paxton*, 5 Johns. R. 260, the counsel for the defendant in error cited the case of *Cortelyou v. Lansing*, when he was interrupted by Mr. CHIEF JUSTICE KENT, who remarked: "That case was never decided by this court. It was argued once, and I had prepared the written opinion, which appears in the report of Mr. Caines; but the court directed a second argument, which, for some reason or other, was never brought on, so that no decision took place on the points raised in the cause. How my opinion got into print, I do not know. It was probably lent to some of the bar, and a copy taken, which the reporter has erroneously published as the opinion of this court."

well considered opinion of the court, delivered by CHIEF JUSTICE TREAT, the doctrine of *Shepherd, Executor, v. Johnson*, 2 East, of *McArthur v. Seaforth*, 2 Taunt., *Downs v. Back*, 1 Stark., and *Harrison v. Harrison*, 1 Car. & P. *supra*, recognizing this supposed exception to the general rule of damages, when the subject matter of the action was stock, or the delivery of goods, the price of which had been pre-paid, is expressly repudiated, and which doctrine, we believe, still remains under the repudiation of a very strong, if not prevailing current of American authorities. *Pinkerton v. Manchester & Lawrence R. R.*, 42 New Hamp. R. 424, and cases there cited; *Sleuter et al. v. Wallbaum*, 45 Ill. 43.

A majority of the court are unwilling to give our adherence to this doctrine of exception to the general rule of damages because the subject matter of the action happens to be stock; because, if there were a just foundation for the distinction, in the days of Mr. Justice Grose and when *Shepherd v. Johnson* was decided, the changes of time and commerce have long since worn it away. It is a fact, and one to which we can not shut our eyes, that within the last quarter of a century almost numberless private corporations have been brought into existence, whose stocks, real or fictitious, have inundated the country, and supplied both the means and the stimulus for the most active, reckless and corrupting speculations and practices of the age. These are encouraged by the fact that now and then, though the value of the franchise itself is the only capital, though it may be based upon lands, oil wells, mines, patent rights or railroad schemes, yet, by the development of the country, or some fortuitous circumstance, persons occasionally realize great fortunes in these operations. Stocks, that cost the owner little or nothing, now and then advance to par, and above. Suppose the owner of such stocks should pledge them when not worth ten cents on the dollar, and the pledgee convert them. They cost the owner little or nothing. Circumstances arise, however, which enhance their value. By delaying his suit, or the trial of it, until those circumstances

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have had their full effect, the plaintiff, by invoking the aid of the presumptions: 1st. That he had parted with his money for the stock; 2d. That he obtained the stock as a permanent investment; and, 3d, that it is to be presumed that he would have kept it until the time of the trial, can elect to take the market value at the time of trial, when each of these presumptions is as baseless as the fabric of a dream. Such a rule, instead of being general, fixed and certain, is merely speculative, conjectural, and dependent upon accidental circumstances.

In *Smith et al. v. Dunlap, supra*, this court said that, "legal rules ought to be general in their application, so far as to embrace all cases depending on the same principles." Believing that to be a sound maxim, a majority of the court adhere to the general, well established rule in this State, viz: that the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion, with interest from that time until the trial, and recognize no exception where the property converted happens to be stocks.

Where the demand and refusal either constitute the conversion or afford presumptive evidence of it, it is no infringement of this rule to regard *that* as the time for estimating the value; and when the article converted is one which has no real market value, but its value is enhanced to the owner by personal or family considerations, then, from the necessity of the case, the rule of damages would be measurably within the discretion of the jury.

We think the evidence offered by the plaintiff, and excluded by the court, tending to show that the railroad company was about to, and did, increase the stock, and that owners of stock were, by its regulations, to have a certain *pro rata* of the new stock at reduced rates, was admissible,—not to enable the plaintiff to recover the value of the new stock, as special damages, but as being a circumstance which would legitimately bear upon the question of the value of the stock converted. As in trover for a ship, the plaintiff sought to prove, as special damages, the freight she would have earned on the next

voyage, but it was held by the court that such circumstance must be included in the value of the ship itself. *Mayne on Dam.* 213.

If the plaintiff had conceived that there was fraudulent misconduct on the part of the defendants, which called for exemplary damages, or if he could lay the foundation for special damages, the way was open to him to join special counts in case, when such misconduct would have been directly in issue. But we can not, from any considerations of supposed hardship of the case, extend the action of trover beyond its legitimate scope, "for trover, though nominally an action of tort, is usually brought to establish a mere right of property, and does not, like trespass, admit of evidence of aggravation." *Sedg. on Dam. sec. 467.*

For the errors indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

THE CHICAGO & NORTHWESTERN RAILWAY Co.

v.

JOSHUA A. NICHOLS *et al.*

1. JURISDICTION IN CHANCERY—*assignes of a contract—remedy at law.* A railroad company entered into a contract in writing with a person, by the terms of which the latter was to manufacture for the company a certain number of cars. This contract was assigned by the party who was to manufacture the cars, to another, who furnished a part of the cars, and assigned his interest in the amount owing upon the contract to certain persons to whom he was indebted for materials, furnished for the construction of the cars. These creditors thereupon instituted their suit in chancery against the railroad company, to enforce the payment of the money due under the contract, to them: *Held*, the complainants had no *status* in a court of equity. If there were any *bona fide* assignees of the contract, they could maintain a suit at law for their use.

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2. SPLITTING A CAUSE OF ACTION. A cause of action arising upon a contract which is an entirety, can not be severed by means of partial assignments, so as to become the foundation of several suits instead of one.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. J. R. DOOLITTLE, Mr. H. B. TOWSLEE, and Mr. JOHN OLNEY, for the appellant.

Mr. JAMES L. STARK, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

The Chicago & Northwestern Railway Company, and Van Kuran & Co., entered into a contract in writing, by the terms of which Van Kuran & Co. agreed to manufacture and deliver, to the Railway Company, a certain number of box cars, for a fixed price. Isaac Van Kuran composed the firm of Van Kuran & Co. On the second day after the making of such agreement, Van Kuran & Co. transferred the same to Andrew S. Van Kuran, by endorsement thereon. It is claimed that Andrew completed the cars, and therefore became entitled to compensation from the Railway Company; and appellees allege, that, to aid in the construction of the cars, they furnished Andrew goods and materials, and to secure them in the payment for such articles, he assigned and transferred to them, in writing, all his interest in the amount owing by the Railway Company, by virtue of the original agreement with Van Kuran & Co., amounting to over three thousand dollars.

Appellees filed their bill to enforce their rights resulting from such assignments, and materials furnished. The contract was for the manufacture of thirty cars, more or less, at eleven hundred dollars each. It is alleged that twenty had been delivered and ten more were ready for delivery, and that the balance due for the cars delivered, was seven thousand dollars.

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Beside the assignment to appellees, Russell & Angell had transferred to them twelve hundred and fifty dollars out of the money due from the Railway Company. In addition thereto, and prior to the filing of the bill, the Barnum & Richardson Manufacturing Company instituted, in the Cook county circuit court, garnishee proceedings against the Railway Company, to secure the indebtedness of Isaac Van Kuran, and a judgment was rendered for over six thousand dollars. This is set up in the answer in bar of any decree for relief. Neither Andrew nor appellees were parties to these proceedings. One court orders the payment of the money to the creditors of Isaac; another to the creditors of Andrew. To permit this would be perpetrating gross wrong and injustice.

It is further alleged in the bill, that it was originally agreed that the Railway Company should give its notes for the deferred payments for the cars; and that by mistake this was not inserted in the written contract. It is insisted that thereby a right to reform the writing inures to appellees. But long before the filing of the bill, the deferred payments would have matured; and if there had been full compliance in the manufacture and delivery of the cars, and a consequent liability to pay, then the Railway Company would have owed the money, and there ceased to be any necessity to reform the contract. This is a mere attempt to force jurisdiction in equity.

The evidence, though conflicting, tends strongly to prove that appellant never knew of any assignment, and, through its agents and officers, refused the recognition of any person, other than Isaac Van Kuran, as a party to the agreement. We are also impressed with the conviction, that the assignment from Isaac to Andrew was not made in good faith, but that the same was a colorable pretense; and whether appellees, in furnishing materials, gave credit to Isaac or Andrew, is involved in too much doubt to justify the decree rendered.

We do not think that such a case is presented by the bill and proofs, as to give appellees a *status* in a court of equity

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The liability of appellant, if any exist, is to Isaac Van Kuran. If there are *bona fide* assignees of Isaac, a suit at law can be maintained for their use, and in such suit the character and effect of the garnishee proceedings can be determined.

The original contract was an entirety. Can it be divided, and assignments made of the several parts, and the Railway Company be involved in the costs and trouble of numerous suits? It has been long settled that a cause of action can not be severed, or made the foundation of several suits instead of one. In some cases it has been held, that the partial assignment of a debt can not bind the debtor, either at law or in equity, and will not deprive him of the right to pay the whole to the assignor. The Railway Company has the right to stand upon the original contract, and decline any acknowledgment of partial assignments. *Stone v. Pratt*, 25 Ill. 25; *Chapman v. Shattuck*, 3 Gilm., 49; *Mandeville v. Welsh*, 5 Wheaton, 278.

As appellees have no right to equitable interposition, the decree rendered herein is reversed and the bill dismissed.*

Decree reversed.

* CHICAGO & N. W. R'Y CO. v. RUSSELL & ANGELL.

MR. JUSTICE THORNTON: This case is identical with the case of the *Chicago and North Western Railway Co. v. Nichols, Doolittle and Munn*, and is decided in the same way.

The decree is reversed, and bill dismissed.

Decree reversed.

THE AMERICAN MERCHANTS' UNION EXPRESS CO.

v.

EMMA GILBERT.

1. EVIDENCE—*competency—motion to exclude*. A party to whom a package, purporting to contain money, had been sent by express, upon calling for it at the place of destination, found it open and containing nothing but pieces of paper of no value. In a suit against the company to recover for the alleged loss, the agent who gave the package to the plaintiff, gave his testimony by deposition, and among the interrogatories in the commission, was this: "State what occurred, fully and in detail, at the time the plaintiff called for the package?" The witness stated, in his answer, a conversation between himself and an assistant superintendent of the company, had out of the presence of the plaintiff, in which the witness spoke unfavorably of the claim of the plaintiff, and also suggested that the package had been opened by his predecessor in the office. On motion of the defendant to exclude from the jury all such portions of the answer as were irrelevant and improper, the court should have excluded all of the private conversation between the two agents of the company, as well that portion unfavorable to the plaintiff, as that adverse to the interests of the defendant, all that part of the answer being incompetent.

2. This private conversation between the agents was not responsive to the question, and though it was given under the interrogatory of the defendant, it was not chargeable to any agency of its own, and therefore the defendant was not precluded from asking its exclusion.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

This was an action brought by Emma Gilbert against the American Merchants' Union Express Company, to recover for the alleged loss by the defendant of the sum of \$1000 delivered, as alleged, by the plaintiff, in a sealed envelope addressed to herself, to the defendant, at its office in Chicago, for transportation to New York. It appeared, upon the plaintiff calling for the package at the latter place, it was found to be open at one end, and, upon examination, to contain slips

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of paper instead of money. James W. Hutt, the cashier of the defendant at its office in New York, and who handed the package to the plaintiff when called for by her, after first sealing up the open end in the presence of the plaintiff, upon her opening it and stating that it did not contain money, referred her to the superintendent, whose office was up stairs, where she went, and shortly afterwards C. G. Clark, the assistant superintendent sent for Hutt, and inquired of him what he knew about it. Hutt told him if he would step into another room he would tell him what he knew about the package, and there, out of the presence of the plaintiff, he stated to Clark various matters concerning it, and who he supposed had opened the package, naming in that connection Mr. C. K. Williams, the former cashier of the defendant at that office, whom Hutt had succeeded but a short time previously, and since the receipt of the package at that office. The testimony of Hutt, taken by deposition, under a commission issued at the instance of the defendant, was read in evidence on the trial, and the question arises as to the ruling of the court in refusing to exclude, on motion of the defendant, certain portions of his testimony from the jury.

Messrs. JEWETT, JACKSON & SMALL, for the appellant.

Messrs. BENNETT & ULLMAN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 31st day of July, 1869, Emma Gilbert, the appellee, delivered at the Chicago office of the American Merchants' Union Express Company, the appellant, a package enclosed in one of appellant's ordinary money envelopes, sealed and addressed to herself, in New York, and purporting to contain \$1000. It appears from the testimony that, on the same day it was placed, with a number of similar packages, in appellant's "through safe," the keys of which were kept only at

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each end of the route, and transmitted to New York, where it arrived on the 2d day of August, 1869, and lay uncalled for until the 28th day of said month; on which day it was called for by the appellee, when it was taken from the safe, and found to be open at one end; an examination was at once made of the contents, which were found to be slips of newspaper cut into the shape of bank bills, and wrapped in two sheets of foolscap paper.

The newspaper slips, on examination, proved to have been cut from a weekly paper published in Philadelphia, and called "The Saturday Night," one slip bearing date July 31, 1869, the day the package was deposited in the express office at Chicago. It appeared that the paper was issued from one to two weeks in advance of its date, and that Mrs. Cooper, the sister of the appellee, who was present at the time of the making up of the package, took said newspaper during the months of June and July, 1869.

The package was made up in the depot of the Illinois Central Railroad Company, at Kankakee, Ill. in the presence and with the assistance of H. C. Cooper, a brother-in-law of the appellee, and a clerk in the freight office of the company at that place; and it appeared from the testimony of stationers, that the foolscap paper in the package which enclosed the said newspaper slips, was identical in color, thickness, ruling and texture, with that used in the railroad office at Kankakee; that they were run through the mill at the same time, and were of the same batch of paper, the witnesses testifying that they could so tell almost beyond a doubt.

This was an action against the appellants, as common carriers, to recover for the alleged loss of the \$1000.

The trial below resulted in a verdict and judgment for the appellee, and the grounds relied upon here for the reversal of the judgment are, the refusal of the court to grant a new trial, because the verdict was contrary to the evidence, and the court erred in refusing to exclude certain testimony from the jury.

The evidence by no means establishes a clear case for the plaintiff, but we shall forbear from commenting particularly upon the evidence, or expressing any further opinion upon its weight, as another trial of the case will be awarded, for the error in refusing to exclude testimony.

The testimony of James W. Hutt, the cashier of appellant, at New York, was taken by deposition. The tenth interrogatory in the commission issued to take his deposition, was as follows, viz: "State what occurred, fully and in detail, at the time the plaintiff called for the package?"

The answer of the witness was very lengthy, stating fully what took place, and the conversation that was had in the presence of the plaintiff, and he stated that on her opening the package, and saying that it did not contain money, he referred her to the superintendent, whose office was up stairs, and she went up to his office. Shortly afterwards C. G. Clark, the assistant superintendent, sent for the witness up stairs, and inquired of him what he knew about it, and the witness told him if he would step into another room he would tell him what he knew about the package. He accordingly did so, and there, out of the presence of the plaintiff, the witness stated to Clark what kind of an attempt he thought it was on the part of the plaintiff, and what judgment he had formed in regard to her character, it being testimony unfavorable to her, and then followed these sentences in his answer: "That I thought very likely Mr. C. K. Williams knew that the package was open, inasmuch as he had remarked that he thought the package was bogus. I also said to Mr. Clark that as soon as Mr. Williams came in, the probability was, that he would explain it. I also stated to Mr. Clark at the time, that the probability was that Mr. Williams had opened it himself."

The defendant's counsel asked the court to exclude all that portion of the answer of James W. Hutt to the tenth direct interrogatory, which related to his supposing or inferring that Williams opened the package, which the court refused to do. The defendant's counsel then asked the court to exclude all of

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the answer which was irrelevant and improper; which the court likewise refused to do; and the rulings of the court in these respects are assigned as error.

The whole of this private conversation between two agents of the express company, out of the presence of the plaintiff, was manifestly incompetent, and the whole, or any distinct part of it, should have been excluded on motion of either party. The part of the conversation in relation to Williams did not qualify the former part of it, in regard to the plaintiff; and it should have been excluded on the defendant's motion; and had the plaintiff desired to have excluded the remaining portion of the answer unfavorable to her case, she could have moved the court to exclude it. On denying the defendant's motion to exclude a portion of that conversation, when the defendant's counsel thereupon moved to exclude all of the answer which was irrelevant and improper, the court should have excluded all of this separate conversation between these two agents, the motion, doubtless, having reference to that.

This portion of the answer was not properly responsive to the interrogatory of the defendant; and the defendant was not chargeable with any agency of its own, in its being admitted under the interrogatory, by the commissioner.

The testimony objected to was well calculated to prejudice the case of the defendant, by creating the impression that Williams had improperly opened the package.

For error in refusing to exclude this testimony, the judgment is reversed and the cause remanded.

Judgment reversed.

THE PEORIA & ROCK ISLAND RAILWAY CO.

v.

THOMAS BRYANT.

1. *RIGHT OF WAY*—*of the width thereof—in what manner to be determined.* Upon an application by a railway company for the condemnation of a right of way, the company is not bound to take and pay for the land described in the petition, if less is needed for its purposes. It is not estopped by the allegations in the petition as to the quantity of land to be taken, when its engineer is of opinion that a less quantity is sufficient.

2. And especially is this the rule where the proceedings are had under the provisions of the act incorporating the Mississippi Railroad Company, under which the Peoria & Rock Island Railway Company was authorized to act in that regard.

3. So, upon an appeal from the action of the commissioners had under that act, to the circuit court, the report of the commissioners is the foundation of the appeal, and the width of land as therein described, must control. When the company acquiesces in the width adopted in the report, with knowledge of it, then it is concluded.

4. *SAME—of the requisites of the verdict.* On the trial of such appeal, under the act mentioned, it is not sufficient that the verdict is for a gross sum in damages; it should give the value of the land taken, also the amount of damages, and a description of the land taken, and the judgment should conform thereto.

5. *SAME—of the burden of proof as to the title to the land.* Where a railway company presented a petition for the condemnation of a right of way over the land of a certain person, alleging therein that such person was the owner of the land, and the report of the commissioners, chosen at the suggestion of the company, also showed that he was the owner, and it further appeared that at the commencement of the proceedings for condemnation, the person so alleged to be the owner of the land was in possession, it was *held*, he was not required to establish his title by proof, in order that he might contest the matter of compensation. The relations of the parties in respect to the burden of proof in that regard, is different where the company institutes the proceedings and acknowledges the title, from what it is where the alleged owner applies for the assessment of damages against the corporation.

6. *SAME—measure of damages—what proper to be considered.* Where the owner of the land, over which it is sought to condemn the right of way,

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claims that he will thereby lose the beneficial enjoyment of a spring on the land, that is a proper subject for the consideration of the jury in adjusting the compensation.

APPEAL from the Circuit Court of Peoria county ; the Hon. S. D. PUTERBAUGH, Judge, presiding.

This was a proceeding for condemnation of land for a right of way for the Peoria & Rock Island Railway Company, which was incorporated by the act of March 6, 1867. Section 16 of that act authorizes the corporation so created to condemn lands under the provisions of an act to incorporate the Mississippi Railroad Company. These provisions are contained in sec. 5 of that act, and so far as they relate to, or may affect, this appeal, are as follows :

“It shall be lawful for any judge of the circuit or county courts of this State, on application of the said company, either in term time or vacation, and at the cost of the said company, to appoint three disinterested persons residing in the county where such lands are situate, not of kin to the owner or owners thereof, whose duty and charge it shall be to view and examine all the lands so taken in said county, with the buildings and improvements, if any thereon, and to estimate the value of the lands so taken or required by said company, and all damages which the owner or owners thereof shall sustain or may have sustained, by reason of the taking of the same for the construction and use of said road or work appertaining thereto, taking into consideration the advantages as well as the disadvantages of the same, by means of the construction and operation of the said road to the said owner or owners ; and when said commissioners are so appointed, they shall act in all cases arising in said county requiring the action of commissioners, whenever said company shall be unable to agree with the owner or owners of said land ; but if, for any cause, either or all of said commissioners shall become disqualified to serve, or their place or places become vacant, such vacancy or vacancies may be filled in the same manner that the original

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appointment was made. And it shall be the duty of the said company to give two weeks notice of their application to a judge of the circuit or county court for the appointment of the said commissioners, to be published for two successive weeks in a newspaper published in the county in which said lands are situate, * * * *

* * * * and the persons so appointed, before entering upon the discharge of such duties, shall take an oath before some justice of the peace, etc., etc. * * * to examine the several pieces or parcels of land so taken or required by said company, and impartially to estimate and appraise the value of the same, and the damages or injury which the owner or owners of each piece or parcel thereof, shall have sustained or may sustain by reason of the taking and using thereof by the said company, over and above the benefits and advantages, which said owner or owners shall derive from the construction of such railroad—thereupon such commissioners shall proceed to examine the premises and estimate the value of such land, and the amount of damages, if any, over and above the benefits and advantages which may accrue to such owner or owners as aforesaid, and shall make a report in writing of such valuation, under their hands and seals, to the clerk of the circuit court of the county where the land lies, and shall return the same within twenty days after making their appraisal, to the clerk of the circuit court of the county in which the land lies, and it shall be the duty of the said clerk to file the same; and in case no appeal shall be made within twenty days after the filing of said reports, as hereinafter provided, then the said clerk shall record the same at the expense of the said company, and judgment of the said court shall be entered thereon, either in term time or vacation, on motion of either party; provided that either party may appeal to the circuit court of the county in which said lands shall lie, within twenty days after said report shall have been filed in the clerk's office of said court, and such appeal shall be tried in the same manner as other issues are tried in said court,

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and the jury empanelled to try the same shall find the value of the land so taken, and the damages which the owner or owners thereof shall have sustained or may sustain by the taking of the same, over and above the benefits which will accrue to such owner or owners from the construction of such railroad, and the judgment of the court shall be entered accordingly. Such appeal shall be taken by giving notice thereof to the clerk of the said court in writing, and thereupon the clerk shall enter the same upon the docket of said court, setting down the railroad company as defendant, and the said claimant or claimants as plaintiff." Private Laws of 1865, p. 172.

The railway company applied to the judge of the county court of Peoria county, for the appointment of commissioners to view, examine and estimate the value of the lands taken or required by it, and the amount of damages, if any, over and above the benefits and advantages which would accrue to the owner from the construction of the railway. The width of the right of way asked to be condemned in the petition was 100 feet, except that over the part of the land occupied by Thomas Bryant a width of 200 feet was required.

The commissioners, on the suggestion of the company, reported as follows:

"Strip of land taken and required by railway, 925 feet long, 50 feet wide and 16-100 of an acre; 388 feet long, 100 feet wide, and 75-100 of an acre; 792 feet long, 200 feet wide, and 54-100 of an acre."

On an appeal to the circuit court, a trial resulted in the following verdict: "We, the jury, find for plaintiff, and assess the plaintiff's damages at \$8000," and judgment was rendered accordingly, from which the railway company took this appeal.

Messrs. BRYAN & COCHRAN, and Messrs. INGERSOLL & McCUNE, for the appellant.

Mr. H. GROVE, and Messrs. O'BRIEN & HARMON, for the appellee.

Per CURIAM: This was a proceeding for the condemnation of the right of way for the railway.

The first and second instructions given for appellee, required the jury to estimate and assess the value of the land, as described in the petition. The width of the land taken, as assessed by the commissioners, was less than the width mentioned in the petition.

The railway company is not bound to take and pay for the land described in the petition, if less is needed for its purposes. Upon no principle is it estopped by the allegations in the petition, as to the quantity of the land to be taken, when its engineer is of opinion that a less quantity is sufficient for the right of way; besides, the statute under which this proceeding was commenced and conducted, determines this question.

The commissioners must examine the land taken and required by the company, and make a report to the clerk of the circuit court in the county in which the land lies. After the filing of the report, either party may appeal. Upon the trial of the appeal, the jury must find the value of the land examined by the commissioners and embraced in their report.

The report is the foundation of the appeal, and the width of land, as therein described, must control.

Suppose that a railway company, through inadvertence, or misapprehension of its necessities, or incompetency or unskillfulness of its agents, filed a petition for a wider strip of land than subsequent investigation showed was necessary, the petition should not be conclusive. By any fair interpretation of the statute, the company should not be compelled to pay for more land than is taken or required. When it acquiesces in the width adopted in the report, with knowledge of it, then it is concluded.

According to the view we have taken, the fifth, sixth and tenth instructions refused for appellant, should have been given. They are based upon the idea that, if the company, after the presentation of the petition, and before condemnation by the commissioners of a width of land for the right of way, required

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a less width, and so informed the commissioners, who acted upon the last requirement, then the report of the commissioners, and not the petition of the company, is the legal evidence of the land taken and required.

The jury rendered a verdict for a gross sum. The statute requires, that the jury shall find the value of the land so taken, and the damages which the owner may have sustained, over and above the benefits. The jury should have made a verdict in which should have been given the value of the land taken, also the amount of damages, and a description of the land taken, and the judgment should have conformed thereto. This would have been in accordance with the evident meaning of the statute. The rights of the parties can only be shown by such a verdict and judgment.

It is contended that appellee had no right to contest the matter of compensation, because he did not prove that he was the legal owner of the land taken; that the statute requires compensation to be made to the owner, and that this means the owner in fee.

The company filed its petition, alleging that appellee was the owner of the land; the report of the commissioners, chosen at the suggestion of the company, showed that he was the owner, and there was proof before the jury that appellee was in actual possession when the condemnation proceedings were commenced. Such possession has always been held to afford a presumption of ownership in fee.

It is a singular position to take, that appellee has no legal right to litigate the question of compensation for the land taken. He has not brought this litigation; it has been forced upon him by the railway company; and now it insists that he must cease all opposition, and abandon his possession at the command of the company, unless he can prove a perfect title. If the company does not desire the condemnation of the land of appellee, let it dismiss the proceeding. It has acknowledged him as the owner, forced him into the courts for the purpose of determining his compensation for lands to be taken, and

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now modestly demands that no compensation shall be assessed, because he has not proved that he is the owner. The company must obtain a title to the right of way from some person. If not obtained from appellee, from whom can it be obtained, under the proceedings to condemn? The argument insisted upon, if carried to its logical conclusion, would have the effect to dispossess appellee, and give the company the land without compensation to any one. Thus it would obtain its right of way without the payment of a dollar.

The cases cited in Pennsylvania and Massachusetts, have no application to the position assumed. In them the owners, under the statutes of those States, applied for the assessment of damages against the corporation. Here, the corporation proceeds to condemn, and alleges ownership in appellee.

In one case cited, *Directors of the Poor v. Railroad Company*, 7 Watts & S. 236, the directors presented a petition to have the damages assessed which had been done to their land by the location of the railroad, and averred that they were the owners of the land. The court held that this was a material part of their case, and they were bound to prove it.

In the case at bar, the company has averred that appellee was the owner of the land, and it has no right to shift the burden of proof, to relieve itself from liability.

The alleged injury to appellee from the loss of the beneficial enjoyment of the spring, was a proper subject for the consideration of the jury. Whether he was deprived of it partially or wholly, is to be determined from the proof. If he could only enjoy it by a conveyance of the water across the railroad track, then there would be a total deprivation, unless the company would give him a perpetual license to flow the water across its right of way.

For the error in giving and refusing instructions, the judgment is reversed and cause remanded.

Judgment reversed.

Syllabus.

CHESTER K. SNYDER *et al.*

v.

PHILIP SPAULDING.

1. *LIEN—upon real estate of sureties of school officers—at what time it attaches.* Under the school law, the lien upon the real estate of a surety upon the official bond of the treasurer of a board of school trustees, in case of the default of such officer, will attach, if judgment shall thereafter be rendered, from the date of the issuing of process in a suit upon the bond, without reference to the time of service.

2. *SPECIFIC PERFORMANCE in favor of the purchaser—delay in payment.* A court of equity will enforce the specific performance of a contract for the sale of land, in favor of the purchaser, where time is not of its essence, although the money was not paid within the time fixed by the agreement of the parties, if any reasonable excuse for such delay be shown.

3. *RESCISSIOn of contract by vendor—for default in payment.* In a suit instituted by a purchaser of land, to enforce a specific performance, it appeared that in May, 1864, the complainant proposed to purchase the premises at a stated price, a portion to be paid down and the balance in one and two years. On the 12th of that month his offer was accepted and the contract closed,—the cash payment made, and the purchaser took possession. On the 16th or 17th of June following the vendor proposed to accept, in satisfaction of the contract, a less sum than the amount of the deferred payments if paid within thirty days, to which the purchaser assented. On the 17th of June a suit was instituted in the county in which the land was situated, against the vendor as surety on the official bond of the treasurer of the trustees of schools in a certain township therein. Within the thirty days the purchaser tendered the amount to be paid within that time, and demanded a deed, but demanded that the vendor should first remove the lien he was advised was created by the suit on the treasurer's bond. This the vendor declined to do. In August following the vendor tendered a deed and demanded the balance of the purchase money, but the purchaser refused to pay the money until the supposed lien was removed. Soon after, the vendor attempted to rescind the contract by a sale to other parties: *Held*, the vendor did not, under the circumstances, have a right to rescind the contract on account of delay in payment. The purchaser was not bound to determine whether the issuing of the summons in the suit on the treasurer's bond, operated to create a lien to his injury. It was sufficient in such case to justify the delay in payment, that the facts cast a cloud upon the title and rendered it suspicious in the minds of reasonable men, and to some considerable extent affected its value.

57	480
27a	280
57	480
133	618
57	480
144	828

Syllabus. Opinion of the Court.

4. SAME—*placing purchaser in statu quo*. Under the circumstances mentioned the vendor would have no right to rescind the contract, even though the purchaser did not make payment within the time agreed upon, without first returning to him the money he had paid, or offering to do so. The vendor was in fault in not removing the cloud upon the title.

5. If there be mutual fault, the party who seeks to avail of the right to rescind must place the other party *in statu quo*. Or, if there be fault on the part of one party and the other party refuses to perform the contract for that reason, the former, before he can rescind the contract for non-performance, must restore whatever consideration he has received.

APPEAL from the Circuit Court of Grundy county ; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Messrs. DENT & BLACK and Messrs. OLIN & ARMSTRONG, for the appellants.

Mr. B. C. COOK, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was a bill filed by the appellee, the complainant below, against George Willis and the appellants, praying for the specific performance of an alleged contract to sell forty-four acres of land, in the east half of the southwest quarter of section 4, township 31 north, range 8 east, in the county of Grundy. The bill was filed January 20, 1865, appellee then being in possession of the land, which he described as being in the east half of the northwest quarter of said section. But during the progress of the cause, viz: April 18, 1868, appellee filed an amended bill, representing the land to be in the east half of the southwest quarter, instead of the northwest quarter, as first described. Also, on the first day of December, 1868, a cross bill was filed by appellants, Snyder and Clover, as grantees of George Willis, praying for possession and an account of rents and profits from Spaulding. On April 26, 1869, a decree was rendered for specific performance, and also at the same time the court dismissed the cross bill of

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appellants, from which decisions they now prosecute this appeal.

Two questions are presented by this record for the consideration of the court:

First. Had Willis the right to rescind his contract with Spaulding, in August, 1864, or prior to that time, because Spaulding had not paid the balance of the purchase money? And this involves the question, whether there was an incumbrance on the land at that time, or an apparent incumbrance, that would afford Spaulding a reasonable ground for withholding the deferred payment for a reasonable time, to see if the same would be removed by Willis.

Second. Had Willis the right, under all the circumstances in this case, to rescind the contract between himself and Spaulding, in August, 1864, or prior to that time, without first tendering back the two hundred dollars, which Spaulding had already paid on the land?

The facts bearing on the solution of these questions may be briefly stated:

In May, 1864, Willis, who resided in the State of Ohio, was the owner of the land in controversy. Benson, who was his agent for the sale of the land, resided at Gardner, near the premises. Spaulding offered six hundred and fifty dollars for the land—two hundred dollars cash in hand, and the balance in two annual payments, with ten per cent interest. This offer Benson, the agent, communicated to Willis, who accepted it about the 12th day of May, 1864, by letter of that date, in which he says the title is good and the land free from incumbrance, except taxes, and authorized Benson to make the sale on the terms proposed, and promised to make the deed as soon as he conveniently could. On the receipt of this letter Benson closed the trade with Spaulding on the terms proposed, and received from him two hundred dollars on the contract; and thereupon Spaulding entered into possession of the land, and commenced to and did make improvements, ranging from one hundred dollars to three hundred dollars in value.

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About the 15th day of June of the same year, Willis came from Ohio to Grundy county, and then learned that the trade had been completed by his agent, Benson, and that Spaulding was **then** in possession of the land. On the 16th day of June, Willis **went to Benson** and received from him the two hundred dollars which Spaulding had paid on the contract, and at the same time executed a **receipt**, in which he stated that the money was received as a payment **on the land**, but erroneously described the land as being in the **northwest** instead of the southwest quarter. At this time, the 16th or 17th of June, Willis proposed if Spaulding would pay four hundred dollars within thirty days, in lieu of the four hundred and fifty dollars to be paid in two annual payments, he would deliver the deed. Spaulding assented to this proposal and promised compliance on his part. In pursuance of this agreement, Willis, being about to return, left a deed which had been executed by himself and wife before he left Ohio, with one William Hart, to be delivered on the payment of the money. This latter agreement between the parties rested entirely in parol, and simply left the original contract as it was, except as to the amount, and time of making the deferred payment. On the 17th day of June, 1864, a suit was brought in the Grundy circuit court against Willis, as security of the treasurer of the board of school trustees of the township, on his official bond, and a summons was issued and on that day placed in the hands of the sheriff.

Before the expiration of the thirty days, Spaulding tendered to Hart four hundred dollars and demanded a deed, and at the same time he demanded that Willis should first remove the lien that he was advised was created by the suit on the treasurer's bond. The fact of this tender and request was communicated by Hart to Willis, who declined to take any steps to remove the lien. In August following, Hart, as the agent, and at the request of Willis, tendered to Spaulding the deed and demanded the four hundred dollars, but Spaulding refused to accept the deed and pay the money unless Willis

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would first remove the lien that he supposed was created by the suit on the treasurer's bond. Soon after this tender Willis sold and conveyed the land for four hundred dollars to the appellants, Snyder and Clover, they having at the time full knowledge of the equities of Spaulding in the premises.

Before this suit was instituted, January 20, 1865, Spaulding again tendered to Hart, as the agent of Willis, the sum of four hundred dollars, and the additional sum of fifty dollars, as the balance of the entire purchase money, and demanded a deed to the land free from all incumbrances, which was refused.

Willis having conveyed the premises, has now no interest in this proceeding, and this appeal is being prosecuted alone by the appellants, Snyder and Clover.

We do not understand that the subsequent arrangement, made between Willis and Spaulding, on the 16th or 17th day of June, was intended to or did abrogate entirely the original agreement between the parties. A valid agreement, with the terms well understood, then existed between them, by which both parties were bound. It might have been regarded as simply a proposition that if a less sum was paid, within a shorter period than was originally agreed upon, it would be accepted in full of the purchase money and the deed delivered, but if it was not so paid the original contract would stand as it was.

But if it was a new contract, and intended by the parties to take the place of the original one, still, time was not made of the essence of the contract, by any express agreement of the parties.

It will hardly be insisted that if time be not of the essence of the contract, in a case where the money is not paid within the time fixed by the agreement of the parties, if any reasonable excuse therefor is shown, equity will not, nevertheless, decree a specific performance. Equity does not propose to relieve against the express contract of parties, but it will recognize a reasonable cause for the non-performance, where time

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is not made the essence of the contract by the express agreement of the parties. Chancery would be wanting in its boasted power to do justice under all circumstances, if it did not possess the power to afford relief in such cases. This principle was recognized in the case of *Brown v. Cannon*, 5 Gilm. 174.

It is insisted by the appellants, that the suit against Willis, on the bond of the treasurer, afforded Spaulding no reasonable ground for not proceeding with his contract, because the suing out of a summons was not a lien, except on the conditions, first, that it should be served, and, secondly, that the plaintiffs in the case should recover a judgment.

It is an admitted fact in the case, that the summons was never served on Willis, and that no judgment, in fact, was ever recovered against him. But it is true, however, that there was a considerable amount due on the bond on which he was sued, of which fact Spaulding was advised at the time.

We do not understand how Spaulding, by anything he could do, could advance the prosecution of the suit, or how he could be in any way held responsible if it was not prosecuted. It was certainly a proceeding over which he could have no control.

But when does a lien in such cases attach, from the issuing of the process, the date of service, or the date of the judgment, if one shall be rendered? It is purely a statutory lien, and the provisions of the statute must control. By the express terms of the statute, sec. 25 of the school law (Gross' Comp.), it is provided that the real estate of the securities of school officers, in case of default, shall be bound from the date of the issuing of the process, and that no alienation of the estate after process issued shall operate to defeat the lien created by this section. There is no provision that it shall require the service of the process or the rendition of a judgment to create the lien. The lien, therefore, attaches, if judgment shall thereafter be rendered, from the date of the issuing of the process, without reference to the time when it was served.

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But it is still insisted, that if the lien could attach from the date of the issuing of the process, it did not attach to the estate in question, for the reason that the contract of sale was made before the date of the process, and that Spaulding was then in possession of the premises, and that Willis, at that date, had no such interest in the land to which the lien could attach.

It is uncertain, from this evidence, whether the parol contract which appellants now insist is the only contract between Willis and Spaulding, was made on the 16th or 17th day of June, or whether it was, in fact, made before the process was actually issued in the suit against Willis.

But if we concede that it was made on the 16th day of June, the day before the date of the process, it will hardly be necessary, for the purposes of this case, to inquire whether Willis, at that date, had such an interest in the real estate to which the lien could and did, in fact, attach. This would involve an inquiry into the questions, whether the term real estate, as used in the statute concerning school officers' bonds, should have as broad a signification as the same term when used in the statute concerning judgments and executions, and many other difficult questions.

If Spaulding, before he could hesitate to go forward in the execution of his contract, was bound to determine whether the process would certainly create a lien upon the premises, then he would be required to decide, with entire accuracy and at his peril, a question of law about which counsel learned in the law differ very widely in their views. This would be imposing too great a hardship on a man wholly unlearned in the law.

It is sufficient if the facts throw a cloud on the title and render it suspicious in the minds of reasonable men, and to any considerable extent affect its value. If Willis were here seeking to enforce a specific performance of this contract, a court of equity would not assist him with this suspicion resting on the title. To this effect is the case of *Brown v.*

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Cannon, ubi supra. It would be most inequitable to do so, for if this lien did attach it might take with it the entire value of the property, and leave Spaulding to pursue his remedy on his covenants, in a distant State. Until Willis was in a position himself to enforce this contract, the law would allow Spaulding a reasonable time to wait for the removal of the cloud on the title. Equity would not require him to lose the benefit of an advantageous bargain, by compelling him to elect at once whether he would rescind the contract, or take the deed and rely on the covenants of a party living in a distant State, for the money advanced and the value of the improvements put upon the land.

But could Willis rescind this contract, under the facts in this case, if it be conceded that Spaulding did not pay the money within the time limited, without returning the money he had received and placing Spaulding in as good a condition as he was before the contract was made? If he could do so in this case, it would be to permit him to reap the reward of his own wrong. It is not denied, nor can it be, that if Willis had removed this lien, or apparent lien, the money would have been paid within the time limited by the contract. We apprehend that no case can be found where the contract has not been performed for the fault of the vendor, and where he has rescinded the contract for the non-performance on the part of the vendee for that reason alone, and yet the vendor permitted to retain the advanced payments. Such a doctrine is at variance with the plainest principles of common sense and justice.

All contracts with reference to lands must be performed or rescinded within a reasonable time. If there is mutual fault, the party who seeks to avail of the right to rescind must place the opposite party *in statu quo*. Or if there be fault on the part of one party and the other party refuses to perform the contract for that reason, such party, before he can rescind the contract for non-performance, must restore whatever consideration he has received; any other rule would manifestly be inequitable. It has been held by this court, that before a

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party can rescind a contract, he must place the other party in *statu quo*, by offering to return whatever he has received under it. *Smith v. Doty*, 24 Ill. 165; *Buchenau v. Horney*, 12 Ill. 336.

The case of *Gehr v. Hagerman*, 26 Ill. 438, was with reference to the sale of land, and is in point. The court say, that usually before a party can rescind a contract, he must restore or offer to restore what he has received on the contract, and place the opposite party in the same situation as he was at the time the agreement was entered into by the parties. A party has no right to claim all the benefit of a contract, and at the same time insist that it is rescinded.

The same rule was recognized in the case of *Sanford v. Emory*, 34 Ill. 468.

The case of *Staley v. Murphy*, 47 Ill. 241, was concerning a land contract, and by the terms of the contract a forfeiture was reserved if payment was delayed beyond thirty days after the maturity of the notes, and the court held, on the authority of *Murphy v. Lockwood*, 21 Ill. 615, that the vendor could not rescind the contract for non-payment, without first tendering back to the vendee, or cancelling the same, the unpaid notes which he held for the purchase money.

It is insisted, however, by the appellants, that Willis, before rescinding the contract, was not bound to pay or tender back the money received, for the reason that the rents and profits enjoyed by Spaulding were an equivalent for the money received. A sufficient answer is, that at the time Willis attempted to rescind the contract no rents had then accrued. The contract was made in May or June, and in August following Willis attempted to rescind the contract.

We must, therefore, hold that Willis was not in a position to rescind, and could not rescind the contract at the time he attempted to do so, for the reason that he had not then paid back or offered to pay back the money received under it.

We find that Spaulding has always been ready to perform his contract and pay the money, if he could get a clear title.

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He could not have anticipated that the amount due on the treasurer's bond, for which Willis was liable, would have been discharged in the manner it was. It was not indispensable that the appellee should have tendered the balance of the purchase money before he instituted his suit. It is time enough for a party to bring the money into court when called upon to do so. *Webster v. French*, 11 Ill. 254.

As soon as the decree was pronounced in his favor he paid the money into court for the use of appellants, and if they did not receive it it is their own fault.

The appellants purchased the property for two-thirds of its value, with the full knowledge of the equities of the appellee, and, therefore, have no better standing in court than Willis would have.

Perceiving no error in the record, the decree is affirmed.

Decree affirmed.

THOMAS ATTRIDGE *et al.*

v.

DANIEL BILLINGS *et al.*

1. GUARDIAN AND WARD—*purchasing land with the ward's money.* Three persons owned an "improvement" on land belonging to the United States. One of them died, leaving children, of whom one of the surviving owners became guardian, receiving money in that capacity, which he loaned upon mortgage security, as required by law. Afterwards the two surviving owners of the improvement purchased the land from the government in their own right. Upon bill filed by the wards to have a trust declared in their favor in respect to such portion of the land as would be embraced in their father's interest in the "improvement," it was held to be no part of the guardian's duty to appropriate any portion of the wards' money towards the purchase of any of this land for them.

2. Guardians will not, ordinarily, be permitted to change the personal property of the infant into real property, or the real property into personalty.

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3. *STEPCHILDREN—of their support.* A step father is under no legal obligation to support his wife's children by a former marriage.

4. *"IMPROVEMENTS" on public land—subsequent sale by the government.* The owner of an "improvement" on the public lands can not set the same up in bar of any action by a *bona fide* purchaser of such lands from the United States. While such "improvements" are regarded as *property* in this State, the right expires on a sale of the land by the government to a third person.

5. *WIDOW—of her right to occupy the home place.* Where a party died while the owner of a "claim" or "improvement" upon the public lands, and upon which he resided with his family at the time of his death, and his widow became his administratrix, it was *held*, that within the spirit of the statute which provides that the widow may, in all cases, retain the full possession of the dwelling house in which her husband most usually dwelt next before his death, together with the outhouses and plantation thereto belonging, free from molestation and rent, until her dower be assigned, the administratrix was guilty of no breach of duty in occupying this claim as a home, instead of selling it.

APPEAL from the Circuit Court of Lake county; the Hon. E. S. WILLIAMS, Judge, presiding.

Mr. W. S. SEARLS, for the appellants.

Mr. H. T. STEELE, for the appellees.

MR. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery, filed in the Lake county circuit court on the 30th day of December, 1858, by Daniel Billings, and Ann Billings, his wife, and William J. Robinson, and Sarah, his wife, (the said Ann and Sarah being two of the children and heirs at law of Robert Swanton, deceased,) against Thomas Attridge, and Mary, his wife, James Swanton, John Swanton, Martha Swanton, (the said Mary, James, John and Martha, being the four other children and heirs at law of said Robert) and James Cole and Thomas Cole, for the purpose of having a trust decreed in favor of the said Ann and Sarah, in 124 64-100 acres of land, a portion of two

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certain quarter sections of land, which had been respectively entered and purchased from the United States by the said James and Thomas Cole, to-wit: the southeast quarter of section 29, and the northeast quarter of section 32, township 44 north, range 12 east, of the 3d principal meridian, in Lake county, Illinois.

The state of facts out of which the supposed trust is claimed to arise, is substantially as follows: In the fall of 1837, Robert Swanton came into the country with his father-in-law, James Cole, and his brother-in-law Thomas Cole, and all of them united in buying from one King, in Lake county, "a claim" on the public lands. King then had, on his claim, five or six acres of land fenced and under cultivation, and a log cabin and stable. They paid him \$100 for his claim, of which Thomas Cole contributed one-fourth, (\$25,) and Swanton and James Cole each three-eighths, (\$37.50.)

The government surveys had not yet been made, and were not made until after the death of Swanton.

They all lived together with their families in the log cabin the first winter. The next season, Swanton built another "shanty" on another part of the claim, into which he moved with his family, where he continued to reside until his death, June 16, 1839. After his death, his widow and children continued to occupy the "shanty" in which he lived at the time of his death, until his widow married Thomas Attridge, May 29, 1841; and after awhile they built another house, not more than three or four rods from the former one, which they have ever since continued to reside in. In August, 1838, Thomas Cole also built a house for himself on another part of the "claim" into which he moved and resided with his family.

The first year after the purchase from King, they all worked the land together. When the land was broken up the second year, they divided it, Thomas Cole taking a fourth part, and James Cole and Robert Swanton three-eighths each, of the land so broken up and cultivated. When the government surveys

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came to be made, it was found the three houses were on separate quarter sections of land ; the one which was on the claim at the time of the purchase from King, and in which James Cole continued to reside, being on the northeast quarter of section 32 ; the one built by Swanton, and in which he resided, being on the southwest quarter of section 28, and the one built by Thomas Cole, and in which he resided, being on the southeast quarter of section 29 ; a part of the land so broken up and worked by Swanton, was found to be upon both the northeast quarter of 32, and the southeast quarter of 29.

On the 30th of January, 1841, letters of administration upon the estate of Swanton were granted to his widow. A bill of appraisement on file in the probate court, finds the value of the estate to be \$1,169 ; the first item mentioned therein being "*the claim*," appraised at \$200, and another item being "cash \$660." No sale of any of the property appears to have been at any time reported, or made.

On the 7th of May, 1841, James Cole was appointed guardian of Swanton's six minor children. On the 14th day of July, 1841, James Cole and Thomas Cole proved up their rights of pre-emption to the two quarter sections of land, which were granted to them, and they purchased the lands for \$200 each, and patents were subsequently issued to them, to Thomas Cole for the southeast quarter of section 29, and to James Cole for the northeast quarter of section 32, being the same lands covered by "*the claim*."

On the 20th of March, 1846, about five years after the entries of the land, the patentees, James and Thomas Cole, conveyed to the appellant Thomas Attridge, 85 acres of the land, described by metes and bounds, a portion being in each of the two quarter sections so entered by James and Thomas Cole. In the meantime, the appellants had continued, as before, to cultivate the land so deeded ; all of the remaining portions of the two quarter sections not deeded to Attridge, were subsequently conveyed away by the patentees

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to third parties, 36 64-100 acres of which, however, were purchased by Thomas Attridge before the filing of the bill in this case, so that at the commencement of this suit, Thomas Attridge was in possession of 121 64-100 acres of the lands so pre-empted and entered by James and Thomas Cole.

The original bill charged, that there was an agreement between Swanton, and James and Thomas Cole, that each of them should have the fee in the equal undivided one-third part of the above described lands when they should be entered, and that each should pay the one-third of the purchase money thereof; and further, that said James and Thomas Cole took the money, to pay for the entry of the lands, from the estate of Robert Swanton, and that the money paid for said lands, by said Coles, belonged to the estate of Swanton at the time of the entry and payment therefor.

The amended bill varied the statement of the agreement between Swanton and the Coles, charging it to be, that after the purchase, Swanton should have the fee in one half of said lands, and make payment for the same, and that the Coles should have the interest in the other half, and make payment therefor.

There is no evidence whatever of any such agreement, further than what might be inferred from the facts above stated, and they are insufficient to afford ground for such inference. Instead of there being the clear proof necessary, to show that any money belonging to the estate of Swanton went into the purchase of the lands, there is no proof to that effect; but on the contrary, there is the positive testimony of Thomas Attridge, that \$100, to pay for the 85 acres of land, was furnished to the Coles by his wife, from money which came to her from her interest in her husband's estate.

It is true, that James Cole, as guardian of the children of Swanton, had, at the time, some of their money in his hands. The appraised value of the estate, according to the bill of appraisement, was \$1,169, one item being the claim, at \$200. From a paper writing found among the files in the probate

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court, in the Swanton estate, in the hand writing of the probate justice, it satisfactorily appears, that \$602.66 was found by the court to be the amount of the distributive share of the heirs in the estate, but in that figuring, \$200 was allowed for the claim ; and as that was never disposed of, it should be excluded ; and doing that, would make the amount \$469.34, which came into the hands of James Cole as guardian ; \$400 of this he put at interest on mortgage security, as required by the statute, and paid it over to the children on their attaining their majority.

It can not justly be said, that it was the duty of the guardian to appropriate any portion of this money towards the purchase of any of this land for his wards. Guardians will not, ordinarily, be permitted to change the personal property of the infant into real property, or the real property into personalty. 2 Story Eq. Ju. sec. 1357.

The guardian would have had good reason to believe, that all this money would have been needed for the support, maintenance and education of these six minor children during their minority. Their mother possessed no means for their support ; all her property that she appears to have possessed, became that of her husband, Thomas Attridge, on her intermarriage with him ; and he, the stepfather of the children, was under no legal obligation to support them. And this money might well have been held by the guardian for the support of his wards, instead of investing it in real estate for them.

But it is said, that under our statute, and decisions of this court, improvements on the public lands, before entry, were *property* ; and the question is asked, in what manner the estate of Swanton has been divested of its interest in these two quarter sections ? The answer is, by a sale by the United States.

The statute, making valid, contracts for the sale and purchase of improvements on the lands owned by the government of the United States, and recognizing "claims" upon them, and giving an action for their protection, expressly provides, that such claim shall not be pleaded or set up in bar of any

action by a *bona fide* purchaser of such lands from the United States.

Whatever interest the estate of Swanton had in these two quarter sections, expired on the sale of them by the United States to James Cole and Thomas Cole. The government was the absolute owner of the lands up to the date of the entry and purchase, and the Coles took a title to the lands and all the improvements upon them, entirely free and unincumbered.

We fail to see any such misconduct as is claimed in their fiduciary relation to this property, of either Mary Attridge as administratrix, or James Cole as guardian, as should affect it with any trust in favor of the heirs of Swanton.

Although the claim was appraised at \$200, we can not hold it to have been the duty of the administratrix, as there were no claims of creditors concerned, to have sold the claim for the benefit of the estate, and thus dispose of the home of herself and her family of dependent children.

Within the spirit of the statute, which provides that the widow may, in all cases, retain the full possession of the dwelling house in which her husband most usually dwelt next before his death, together with the outhouses and plantation thereto belonging, free from molestation and rent, until her dower be assigned, the administratrix was guilty of no breach of duty in occupying this claim as a home, instead of selling it.

James Cole did not make a purchase of property which his wards had any interest in; they had no interest in the land, as against the United States or its grantees. Robert Swanton had acquired no pre-emption right to any of the land; but the pre-emption right was adjudged to James Cole and Thomas Cole, and in their purchase they but availed themselves of a right awarded to them under the law.

The fact that Mary Attridge, the widow of Swanton, and daughter of James Cole, furnished the purchase money for 85 acres of the land, and that the latter consented to its being bought for her, or her husband, in his name, we do not regard as a

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recognition, by Cole, of a subsisting legal or equitable interest of the heirs of Swanton in the land. Allowing this to be done, was but an act of favor on the part of Cole, and not a matter of legal obligation. We can assign to it no greater weight than as being in discharge of a moral obligation.

So far as appears, no pre-emption right, in respect to the two quarter sections in question, could have been established in Robert Swanton. The pre-emption law of the 22d of June, 1838, the one which must apply, required the personal residence of the settler on the land at the time of the passage of the act, and for four months next preceding, in order to entitle him to the benefit of its provisions.

According to the testimony of Samuel Cole, they all three, Robert Swanton, James and Thomas Cole, lived in the log house on the northeast quarter of 32, the first winter, and the next season (1838,) Swanton built another "shanty" on another quarter section, the southwest quarter of 28, into which he moved with his family.

The complainants below introduced in evidence the affidavits of James Cole and Thomas Cole, made on proving up their rights of pre-emption, in both of which it is stated, that no other person than James Cole resided on the northeast quarter of section 32, between February 22d, 1837, and June 22d, 1838; so that, according to those affidavits, Swanton must have gone off from the northeast quarter of 32, and on to the southwest quarter of 28, as early as February 22d, 1838.

The other four children and heirs of Swanton, filed their answers and disclaimers, disclaiming all interest whatever in the lands described in the bill, or in any part thereof, and in the estate of Swanton. The appellants have a title to the lands from government down, and they had been in continuous possession for nearly twenty years before the bill was filed, paying all the taxes. The complainants, Ann and Sarah, upon arriving at their majority, received, the one, \$112, and the other, \$96.20, from James Cole, being, as he informed them,

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their full share of the estate of Swanton. They suffer the matter to slumber, Ann, for nine years, and Sarah for five years, after attaining their majority, before bringing this bill.

At the death of their father, Ann was but eight, and Sarah but four years old; and although they did not live at home during the entire term of their minority, they must have done so for some four or five years each.

Upon the death of Robert Swanton, a helpless family of six children was left to be supported. The mother supported them herself until she married Attridge, and after that time her husband and herself supported and clothed them for at least quite a portion of their minority; and out of the small estate left, \$400 was kept at interest by their guardian, from May 20th, 1845, and out of which Ann and Sarah have each received their share, when the whole amount of it might properly have been expended in their support.

We regard the case as destitute of equity, and think the court erred in decreeing the relief sought as to 85 acres of the land.

The decree is reversed and cause remanded for further proceedings in conformity herewith.

Decree reversed.

N. B. SMITH *et al.*

v.

THE CITY OF CHICAGO.*

1. PRACTICE — of objections which must be specific. In the matter of a special assessment in the city of Chicago, on the application for judgment

*This case and the following were considered in one opinion: *Unknown Owners and Azel Dorathy v. City of Chicago*, *P. F. W. Peck and Azel Dorathy v. Same*, *R. McClelland and M. O. Walker et al. v. Same*, *Potter Palmer and M. O. Walker et al. v. Same*, *Moses Gray and W. H. Adams v. Same*, and *Unknown Owners and John C. Haines v. Same*.

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it was objected, that the schedule containing the statement of the unpaid assessments and the list of lands, was not signed by the collector, nor corporeally annexed to the report in which it was referred to, so as to identify it: *Held*, the objection, if it be one at all, could have been obviated on the trial, and, therefore, the ground thereof should have been specifically stated.

2. *SPECIAL ASSESSMENTS—recording of the judgment, orders, etc., on the report.* The requirement in the charter of the city of Chicago, that in the matter of a special assessment, the judgment, orders, etc, must be recorded upon the report of the collector, even if considered to be mandatory, is in respect to something to be done after judgment, the omission of which could not affect the validity of the judgment itself, whatever might be its effect upon a sale under the judgment.

3. *SAME—certificate of publication.* A certificate of publication of a notice of application for judgment upon a special assessment warrant in the city of Chicago, stated that the notice had been published ten days consecutively, commencing on a particular day: *Held*, there being no exception for holidays, the court could determine by computation the dates of the first and last papers containing the notice, and, therefore, the certificate was sufficient.

APPEALS from the Superior Court of Chicago.

These cases arose upon proceedings had in the court below upon applications for judgments upon a certain special assessment warrant, in the city of Chicago. Judgments were rendered in favor of the city, from which the several owners took these appeals.

PER CURIAM: The records in all these cases are alike, and the questions raised in each case the same. They will, therefore, be considered together as one case. The first objection, and upon which a voluminous argument has been submitted, is, that the schedule containing the statement of the unpaid assessments, and the list of lands, was not signed by the collector, nor was it corporeally annexed to the report in which it was referred to as a schedule of the same. The schedule had a heading sufficient to designate it, and if it had been physically annexed to the report, no question could have been made as to its identity. Can it be contended, that if the attention of

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the court had been called to the want of annexation of these papers, at the time, it would not have been competent for the court to have permitted the collector to attach them together? It is, therefore, an objection, if it be one at all, which could have been obviated, and falls within the class requiring the ground to be specifically stated. The objection made was general, that the collector's report was insufficient to entitle the plaintiff to judgment.

Another objection, equally frivolous and untenable, is, that the judgment, orders, etc., were not recorded upon the report of the collector, in pursuance of the provisions of the 14th sec. of chap. 9 of the charter. If we were to hold these provisions mandatory (but which we do not), it is something to be done after judgment; the omission might, or might not, affect the validity of a sale under the judgment; but can not, by possibility, affect the validity of the judgment itself.

The only remaining objection is, that certain certificates of publication are defective. The certificates state that the appended notice had been published in the Chicago Republican etc., ten days consecutively, commencing on a particular day. There being no exception for holidays, as in the case of *Rue v. The City of Chicago*, ante, 435, the court can determine by computation the date of the first and last papers containing the notice. In that case, we said: "No particular language is requisite to a compliance with the statute, providing the certificate contain such dates and facts as that the court can determine from them the date of the first and last papers containing the notice."

Finding no error in these records, the judgments must be affirmed.

Judgments affirmed.

GURDON HEWITT *et al.*

v.

CHARLES DEMENT *et al.*

1. **AMENDMENTS of bill in chancery—when allowable.** As a general rule, amendments to the pleadings in chancery are in the discretion of the circuit court, and, when permitted for the furtherance of justice, the opposite party can not be heard to complain unless he can show his substantial rights have been prejudiced thereby.

2. In this case the complainant was allowed to so amend his bill upon the argument of the cause as to adapt the pleadings to the proofs of the defendant already in. There being obviously no delay occasioned, and it not appearing the defendant was in any manner surprised thereby, the amendment was regarded as properly allowed. The 34th section of the chancery act provides that the circuit courts, when sitting as courts of equity, may permit the parties to amend their bills, petitions, pleas, etc., on such terms as the court may deem proper, so that neither party be surprised or delayed thereby.

3. **USURY—principle on which it is allowed as a defense.** Usurious transactions, from the actual or presumed disparity of condition between the parties, the borrower being generally controlled by a necessity which places him measurably within the power of the lender, have ever formed an exception to the general rule that parties shall be deemed *in pari delicto*, when they intentionally participate in the violation of law, the borrower being regarded as under such constraint of circumstances, such moral duress, as to take from him the character of *particeps criminis*.

4. **SAME—parol evidence allowable.** In regard to transactions alleged to be usurious, parol evidence is admissible, in equity, to vary or contradict written contracts, for the purpose of showing their real character, and it has been held admissible to show by parol that a contract in the form of an absolute sale, was but a security for an usurious loan.

5. **SAME—what constitutes usury.** In this case, a loan for \$5000, was negotiated, and a note given to the lender for that amount, with ten per cent interest, the money not being paid to the borrower at the time, however, but the lender gave him a letter of credit authorizing the borrower to draw on him for the sum mentioned in the note whenever it should be made satisfactorily to appear that the security offered was sufficient. The borrower received only \$4500 of the amount, and it was understood he was to receive no more, the deficiency being represented by a draft drawn by the borrower and delivered to the lender at the time the note was given, and which was never paid. The transaction was held to be usurious, the draft mentioned having been given to cover its real character.

57	500
188	955

57	500
187	494

57	500
190	*175

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6. ACCOUNTS—*should be referred to the master.* Questions arising out of matters of account, unless there has been a reference to a master to take and state the account, and the proper exceptions taken before him and in the court below, will not be considered by this court.

WRIT OF ERROR to the Circuit Court of Stephenson county;
the Hon. BENJAMIN R. SHELDON, Judge, presiding.

Messrs. THOMAS J. TURNER & SON, for the plaintiffs in error.

Mr. WILLIAM BARGE, for the defendants in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a bill in equity, filed by defendants in error, in the Ogle county circuit court, against plaintiffs in error, which, in substance, was to restrain the sale of certain real estate which was about to take place under and by virtue of a power of sale contained in a trust deed upon the lands of Charles Dement, which deed had been executed to a trustee to secure Gurdon Hewitt, senior, for moneys loaned by him to said Charles Dement. The ground upon which it was sought to restrain the sale was, that the trustee was proceeding to sell for more than was legally or equitably due said Hewitt, for the reason, among others, that a considerable sum should be deducted for usury in said loans. The bill prayed that an account might be taken between the parties to the transaction out of which the security arose, was verified by oath, but waived the necessity of an answer under oath. Answers were filed, which are very full and voluminous. The cause was brought to issue by replications, and the venue thereof changed to Stephenson county, where it was heard upon pleadings and proofs, the amount due to Hewitt ascertained, and a decree accordingly, and enjoining the residue.

The defendants below bring the record to this court by writ of error. The errors relied upon for reversal are: first, in permitting amendments of the bill; second, in finding the issue as to usury in favor of complainants, and third, in respect to items and the results of the account between the parties.

Was there error in allowing amendments, for which the decree should be reversed? Three amendments were made, the last of which was upon the argument of the cause.

The whole subject is covered by the statute. The 34th section of the chancery act (R. S. 1845, 97) declares that circuit courts, when sitting as courts of equity, may permit the parties to amend their bills, petitions, pleas, answers and replications, on such terms as the court may deem proper, so that neither party be surprised or delayed thereby. Here there was obviously no delay occasioned by the amendment, and we are unable to see that plaintiffs in error were surprised thereby. The amendment was not made for the purpose of adapting the pleadings to complainants' proofs, but to that of the defendants' already in. If they were surprised by the amendment, they have certainly failed to show how or wherein.

In *Jefferson County v. Ferguson et al.* 13 Ill. 33, four amendments were allowed to the bill, two of which were permitted after the case had been argued, and while it was under advisement in the court below. The permitting of these amendments was assigned for error. The court said: "We do not think that the decree should be reversed for this cause alone. As a general rule, these amendments are in the discretion of the circuit court, and when admitted for the furtherance of justice we ought not to listen to the objection, unless the party can show that his substantial rights have been prejudiced by the amendments which have been allowed." See also *McArtee v. Engart*, 13 Ill. 250; *Moshier v. Knox College*, 32 Ill. 163; *Mason et al. v. Bair*, 33 Ill. 199; *Farwell v. Meyer et al.* 35 Ill. 51; *Marble v. Bonhotel*, 35 Ill. 240; *De Wolf v. Pratt et al.* 42 Ill. 198; *Craig v. The People ex rel.* 47 Ill. 487. We

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are of opinion there was no error in permitting the amendments.

The second assignment of error relied upon is, that the court erred in finding that there was usury in the note of \$5,000 given Sept. 28th, 1852.

This assignment of error involves the principal question arising upon the evidence, which has been discussed by counsel. We have carefully weighed the evidence, and come to the conclusion that it sustains the finding of the court below.

There are few instances of the violation of law, falling under the scrutiny of courts, which have summoned to their aid so many ingenious devices to conceal their real character, as those of the laws against usury. These instances, from the actual or presumed disparity of condition between the parties, the borrower being generally controlled by a necessity which places him measurably within the power of the lender, have ever formed an exception to the general rule that parties shall be deemed *in pari delicto*, when they intentionally participate in the violation of law; because the borrower is regarded as being under such constraint of circumstances, such moral duress, as to take from him the character of *particeps criminis*. From these considerations has arisen a sort of policy of the courts, which has dictated the duty of exercising a high degree of scrutiny and astuteness, in respect to transactions alleged to be usurious. To that end, rules of evidence, firmly established as to other classes of cases, are made to yield to the searching investigation and stern inquisition demanded by that policy. Parol evidence is admissible to vary or contradict written contracts, or to show that a contract in the form of an absolute sale, was but a security for a usurious loan. *Ferguson v. Sutphen*, 3 Gilm. 547.

The arrangement for the loan of the \$5,000 in question, was made at Dixon, Ill. on the 28th of September, 1852. It was made between Gurdon Hewitt, senior, and Charles Dement, both of whom were witnesses in the case. In the principal features of that arrangement they both concur. A note

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to Hewitt for \$5000, bearing that date, was drawn up by him and signed by Charles and his brother, John Dement, whereby they agreed to pay Hewitt that sum, payable in installments as follows: \$1700 in three years, the same sum in four years from date, and the balance of \$1600 in five years from date; all to draw interest at the rate of ten per centum per annum. Both principal and interest were payable in the state of New York. The instrument recited, that it was given for money borrowed of Hewitt at Dixon, and provided that upon any default as to principal or interest the whole should thereupon become due. The agreement also was, that Charles Dement and wife should execute a deed of trust upon certain lands situate in Ogle and Lee counties, Ill. to secure the note. Hewitt prepared this deed and it was executed. Then, as Hewitt lived in Owego, Tioga county, in the state of New York, and was obliged to return home immediately, and, as he, as yet, had caused no examination to be made of the title to the lands on which the security was to be given, it was agreed that he would give the Dements a letter of credit authorizing them to draw on him for the sum of \$5000, orders payable at sight, which authority was made conditional that Dement would get the trust deed recorded, or, if the one made was in any way imperfect, to make a new one; to get the proper certificates of title and that there was no incumbrance on the land; and William W. Heaton's certificate that the matter was all legally and rightfully done to secure the said loan, and send the papers to Hewitt. "When," the letter concludes, "I will pay as above stated on reception of the papers." This instrument bears date, Dixon, Sept. 28th, 1852. Hewitt then left for home. Charles Dement proceeded to have the trust deed recorded in Ogle and Lee counties, for which he paid \$2.50. He obtained the certificates required by the conditions of the letter of credit, and caused them to be forwarded to Hewitt at Owego, New York. He testifies that he never received but \$4500 of that loan purporting to be \$5000, and that it was the agreement at the time that he was to receive

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but that sum. That the way in which Hewitt obtained the voucher for the whole sum was this: At the time the note and trust deed were drawn at Dixon, on the 28th of September, 1852, Hewitt required that a draft for \$497.50 be drawn by the Dements upon him, in favor of Charles Dement, which was accordingly done, and the instrument then and there delivered to Hewitt. The amount of this draft, together with the \$2.50 to be paid by Charles to get Hewitt's trust deed recorded, was, as Charles Dement testifies, to make up the difference between the \$4500 and the face of the note. Dement swears positively that Hewitt, neither at the time this draft was drawn and handed to him, nor at any other time, ever paid him, or anybody else for him, anything on account of that draft. If this draft was, in fact, drawn and delivered at that time, as Dement testifies, why was it done? Upon what theory can so peculiar a fact be accounted for, except upon the hypothesis that it was to furnish Hewitt with the means of covering the usurious character of the loan? It was well understood by the parties that no money was to be advanced at that time. The letter of credit was upon conditions, which if complied with at all, could not be without the lapse of considerable time. Hewitt does not pretend in his testimony that he paid Dement, or any body for him, anything on account of that draft at the time he received it; nor does he deny that he received it at that time. On the contrary, he admits having it, attaches to his deposition a copy of it which bears the same identical date as the letter of credit. This fact supports the evidence of Dement, and shows conclusively that the draft was drawn and handed to Hewitt at the same time of the other papers alluded to. Dement was pressed for money, but why should he do so absurd and unbusinesslike a thing as to make and deliver this draft to Hewitt at this time, if he ever expected to get anything on account of it, more than as a means of consummating the loan of \$4500, for which he was to give his note secured by trust deed, for \$5000, at ten per cent interest per annum? Nor can it be said that the draft was

Opinion of the Court.

given on account of some other matter. Its very terms make it relate to this, and no other transaction. It is as follows:

“GURDON HEWITT, Esq.:

Pay to the order of Charles Dement, \$497.50, and charge to us *on account of \$5000, and for which you have this day authorized us to draw on you, for this.*

“CHARLES DEMENT,
JOHN DEMENT.”

“DIXON, ILL. September 28th, 1852.

Here is another extraordinary feature: By the terms of the letter of credit, Hewitt was to pay nothing upon it until the papers were sent to him, comprising certain certificates that might never be obtained. Until these were obtained and sent, the letter of credit was inoperative, and there was no authority to draw which would have made a draft good even in the hands of a holder acting on the faith of the letter. Why waive the conditions in respect to this particular draft? No reason has been assigned; no explanation offered of this strange proceeding.

We assume it to be true, therefore, that this draft was drawn and handed to Hewitt on the day of its date, and that he took it away with him without advancing the amount of it. If so, then when, how, and to whom did he afterwards pay it? As he lived at Owego, New York, and the Dements at Dixon, Illinois, Hewitt could have paid it only by accepting and paying some subsequent draft for a like amount, by sending the money or some check, or bill, by mail or express, or by delivering the same to Charles Dement personally. He is able to state specifically how and when and to whom he paid the other drafts, which were drawn after the papers were completed and sent, for the \$4500; but none of which were drawn until the following November. But, as to that in question, he vouchsafes no explanation. He simply produces a copy, and says he accepted and paid it. If this statement were true in the sense in which he meant the court should understand it, why could he not state, when, how, and to whom it was paid, as he

Opinion of the Court.

did in regard to the others? Dement's evidence is corroborated, and his theory of the transaction sustained by circumstances which are established beyond doubt; while Hewitt does not fairly meet the facts which these circumstances press him to answer. A general denial of the usury, or a general statement that he had accepted and paid the draft of the 28th of September, without any explanation of the extraordinary fact of its coming into existence in the manner stated, or how, when, or to whom it was paid, will not suffice to overcome facts and circumstances which lead unerringly to the conclusion of usury.

It is conceded by counsel, that if this loan was usurious, the court below proceeded upon the right principle in ascertaining the amount due, but erred in some of the details of the process. There was no reference to a master to take and state the account between the parties. Their transactions were not limited to the particular loan under consideration, but afterwards extended not only to subsequent dealings in reference to that, but to other moneyed transactions, and all of a complicated nature.

The counsel ask us to perform the duties of a master in chancery, and take and state the account between these parties. They have presented the account according to their views, covering eleven printed pages, and being complex and intricate in its nature. A complex and intricate account is not a fit subject for examination in court, and the practice established for the convenience of courts shields us from the imposition of any such duty. If parties desire to reserve questions arising out of matters of account, they must have a reference to a master to take and state the account, and take the proper exceptions before him, and in the court below. *Brockman v. Auger et al.*, 12 Ill. 277.

The decree of the circuit court is affirmed.

Decree affirmed.

Mr. JUSTICE SHELDON having decided the case below, took no part in the decision.

C A S E S

IN THE

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, 1871.

ADLAI E. STEVENSON *et al.*

v.

ANNA B. LOEHR.

57	509
83a	109
57	509
187	1 81

1. **VENDOR AND PURCHASER**—*incumbrance—condemnation for right of way*. If the owner of a tract of land sells it, giving a contract for a deed of general warranty to be made on final payment, and between the sale and the making of the deed a portion of the premises is condemned under the right of eminent domain for a railway track, the incumbrance thus created is not one for which damages can be recovered in an action on the covenants in the deed.

2. Though in case the damages to the land by reason of such condemnation are paid by the railway company to the vendor, and he fails or refuses to account therefor to the vendee, the latter would probably have his option between an action for the damages as money had and received to his use, or an action on the covenants in his deed. The vendor in such case

holds the damages in trust for the vendee, to be accounted for when the purchase money is paid.

3. If the damages are paid in special benefits to the land, the vendee is regarded as having received, in that manner, the consideration for the condemned portion.

4. While the damages to the land belong, in equity, to the purchaser, yet, when paid in money, if the security of the vendor would be impaired by the receipt of the same by the purchaser, he might insist they should not be paid until his security be increased to that extent, and the purchaser would have a corresponding right to security if about to be placed in jeopardy by the payment of the damages to the vendor.

5. SET OFF—as between vendor and purchaser. In an action on a promissory note by the payee against the maker, it appeared the note was given for the unpaid purchase money of a tract of land which the vendor had contracted, upon the payment of the note, to convey to the vendee, by deed of general warranty, but the deed was in fact executed before final payment was made, and in the mean time a portion of the land had been condemned, under the right of eminent domain, for a railway track: *Held*, the damages to the defendant, arising by reason of the incumbrance thus created on the land, could not be set off against the note.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action brought by Anna B. Loehr against Adlai E. Stevenson and others, upon a promissory note executed by the defendants to the plaintiff. Upon trial by the court, a jury being waived, judgment was rendered in favor of the plaintiff for the amount of the note. The defendants appeal.

Messrs. STEVENSON & EWING, and Mr. HAMILTON SPENCER, for the appellants.

Messrs. WELDON & BENJAMIN, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

We are of opinion, where a person, having a perfect title to a tract of land, sells it, giving a contract for a deed of general

Opinion of the Court.

warranty to be made on final payment, and between the sale and the making of the deed a portion of the premises is condemned, under the right of eminent domain, for a railway track, the incumbrance would not be one for which damages could be recovered in an action on the covenants in the deed. Although the legal title does not pass from the vendor by the contract of sale, he holds it from that time merely as security for the payment of the purchase money. The purchaser becomes the equitable and substantial owner, subject only to the right of the vendor to the payment of the purchase money. If allowed to take possession, as is almost universally the case in this State, the vendor can not oust the purchaser so long as the latter complies with the terms of the contract, and the purchaser is liable for the taxes assessed after he takes possession. The relation of the parties is not substantially different from what it would have been if the vendor had given a deed and taken back a mortgage to secure the payment of the unpaid purchase money, except that where only a contract is given, the vendor can insert terms reserving to himself a more efficient remedy in case of default in payment. Should he refuse to convey on payment, the purchaser, it is true, would have to file a bill in chancery to procure his deed, but where there are a deed and mortgage, he would have to file a bill to procure a satisfaction of the mortgage, if the vendor should refuse to cancel it.

In such cases, then, if the railway company, condemning a portion of the land, pays damages, they would belong, in equity, to the purchaser. It is true, if the security of the vendor would be impaired by the receipt of the damages by the purchaser, he might insist they should not be paid to him until his security had been increased to that extent, and the purchaser would have a corresponding right to security, if about to be placed in jeopardy by their payment to the vendor. But the damages belong, in fact, to the purchaser, and if the vendor receives them he must hold them as trustee for the purchaser, to be accounted for when the purchase money is

Opinion of the Court.

paid. Suppose the land has doubled in value between the sale and the condemnation. Suppose it has been bought at \$100 per acre, and has risen to \$200, and the railway takes five acres and pays \$1000. Here is a profit of \$500, and certainly no one would pretend that the vendor would be entitled to it. He could not, by remitting to the vendee the purchase money at the rate of \$100 per acre, claim the right to receive the condemnation money at double that rate.

The condemnation of the land under the right of eminent domain is, in fact, for the purposes of the present question, a sale of it by the purchaser, for which the law secures to him, and he is supposed to receive, full compensation. It is in the nature of a forced sale, it is true, but the responsibility is not upon the vendor. All persons hold their lands subject to the exercise of this right of eminent domain, and it is difficult to see why one holding land under a contract of purchase, and obliged to yield a part of it by this forced sale to the State or to persons clothed with the authority of the State, for full compensation, should have any more claim against his vendor on the covenants in a deed subsequently made, than he would have if he had made a private voluntary sale. If he has himself received the damages from the railway company, without objection on the part of the vendor, it would seem simply preposterous in him to claim, after he receives his deed, that his vendor should also respond to him upon the covenants, for the purchase money of the same land. If, on the other hand, his vendor has received the damages, and refuses to account for them, the purchaser could certainly hold him responsible for them, or probably might, in the event of such refusal, have his option between an action for the damages, as money had and received for his use, or an action on the covenants in his deed.

If, at the condemnation of the land, the damages are not paid in money, but in special benefits to the land, there would be the same reason why the vendor should not be subjected to a suit, after he has made his deed, that there would have been

Opinion of the Court.

if the purchaser had received for his own use the damages in money. In both cases he has received the consideration for the forced sale, and should not be permitted to demand it twice. A demand of that sort would, in all cases, be unjust; in the present case it is peculiarly so.

The question is here raised by way of defense to a suit brought by the vendor, Anna B. Loehr, upon a note given by the purchasers for the unpaid portion of the purchase money, the deed having been made before it was paid in full, but subsequent to the making of the original contract. That bore date April 8th, 1867. The deed was given July 31st, 1867, and between these dates the railway company condemned the land. We say the defense in this case is peculiarly destitute of merit, for the agent of Mrs. Loehr saw the president of the coal company which purchased the land, about the time the railway commissioners were assessing damages, and was told by him the company would claim no damages. The agent claimed none for his mother, the vendor, and it was evidently considered by all parties that it would be an advantage, instead of an injury, to have the railway company run its line along the side of the tract, as the land in question, amounting to about two acres, was bought by the defendants for the purpose of raising coal, and they expected increased conveniences in shipping, from having the track laid along the line of their land. Indeed several of the purchasers, who were sworn upon the trial, are candid enough to say that they would rather have the road as it is, than not to have it at all.

The land, then, taken in this case, was paid for in special benefits, which enured to the defendants. It was paid for in this mode, by their virtual consent. They asked no damages, and expected none, from the railway, but when, after the lapse of two years, they are requested by the plaintiff to pay their note, they ask to be permitted to pay a large portion of it by setting up against her the very damages which have already been paid to them by the railway company, with their consent, in special benefits, and which benefits they were obliged, on

Syllabus. Statement of the case.

the trial, to admit, so far exceeded the damages that they had been the gainers by the building of the road.

We are of opinion this judgment should be affirmed.

Judgment affirmed.

TOLEDO, PEORIA & WARSAW RAILWAY COMPANY

v.

JOHN W. BRAY.

1. *NEGLIGENCE in railroads—killing stock.* Where stock is killed on a railroad track, and the engineer in charge at the time, could, by the use of ordinary care and skill, without danger, have stopped the train in time to avoid the collision, although the animals were wrongfully upon the track, the company is nevertheless liable.

2. *SAME—who may determine what facts constitute negligence.* In an action against a railroad company to recover for the killing of plaintiff's cows by the defendant's train, an instruction which directed the jury on behalf of the plaintiff "that if they believed, from the evidence, that the engine driver by the use of ordinary skill and prudence could have seen the cows spoken about by the witnesses, or that he did see the cows, and that he might without danger, by the use of ordinary care, have stopped the train before striking the cows and did not, that this would be negligence on the part of the defendants," upon objection that the court by the instruction encroached on the province of the jury in telling them that a certain state of facts constituted negligence, was regarded as not open to such objection.

APPEAL from the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an action brought by Bray against the railway company, before a justice of the peace, for the alleged killing of plaintiff's stock by the defendant's train. Judgment was rendered in favor of the plaintiff, from which the defendants appealed to the circuit court. A trial by jury in the circuit

57 514
58a 23
59a 47

Opinion of the Court.

court resulted in a verdict and judgment for the plaintiff for \$90. The defendant brings the cause by appeal to this court.

Messrs. MARSH & MARSH, for the appellant.

Messrs. MANIER, PETERSON & MILLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

Appellant complains of the giving of appellee's second instruction ; it is this :

"The court further instructs the jury, on the part of the plaintiff, that if they believe, from the evidence, that the engine driver, by the use of ordinary skill and prudence, could have seen the cows spoken about by the witnesses, or that he did see the cows, and that he might, without danger, by the use of ordinary care, have stopped the train before striking the cows, and did not, that this would be negligence on the part of the defendant."

The objection taken is, that the court by this instruction, has encroached upon the province of the jury, in telling them that a certain state of facts constituted negligence. We fail to perceive the force of the objection. It tells the jury that if the engine driver could, by the use of ordinary skill and prudence, have seen the cows, and by the same kind of care could have avoided the injury, a failure to do so would be negligence. This leaves it to the jury to say what is ordinary skill and prudence in seeing the animals, and what would have been ordinary care in stopping the train before it reached the cows. The entire question, of care, skill, and prudence, was left to the jury. The court only said, as it unquestionably might, that the omission of care and prudence was negligence. Prudence and care are the opposite of negligence. To use care is to avoid negligence, and to omit the use of care is to be guilty of negligence.

Opinion of the Court.

We perceive no error in requiring an engine driver to stop his train, if it may be safely done, by the use of ordinary care, so as to avoid the destruction of life or property. No one would for a moment doubt that it would be his duty to do so to preserve the life of a human being, or to prevent injury to a person. And, in principle, whatever the difference in degree, there is no distinction. A person has no right to destroy the property of another because the latter may be negligent, or because his animals may be trespassing. No person has the right unnecessarily to inflict a wrong or produce a loss upon another. The law affords a remedy against the owner of cattle trespassing on others. Even if the animal in this case could be said to have been wrongfully on the railroad track, still that did not license the engine driver to destroy it. If the company may omit all efforts to prevent injury to one animal on the track, may they not when a large number are so situated? If they may omit all efforts to prevent killing one cow, may they not omit efforts to avoid killing a drove of cattle or horses? We think the instruction embodies a correct principle. An engine driver is, however, not required to endanger the passengers aboard the train to prevent a collision with an animal, even if seen in time to avoid the collision. He is only required to do so when safety to passengers will justify it, as his first and highest duty is to preserve human life even to the destruction of property. This instruction conforms to this rule, and being proper it was rightfully given.

It is insisted that the court below erred in refusing appellant's second instruction. It no doubt embraced a correct principle of law, but the same principle was contained in appellant's second instruction which had been already given. This being the fact, the court below, as this court has repeatedly held, was not bound to repeat it. When the jury are once clearly and accurately instructed on a question, that should suffice, as they are presumed to be as capable of comprehending it thus given, as if repeated. So of the fifth of appellant's instructions. The rule it announced was clearly and

Syllabus.

unqualifiedly stated in appellee's first instruction, as a condition to his right of recovery. And as the instruction is short, clear, and to the point, we can not believe the jury could have failed to fully comprehend its full import, and if so they were properly instructed on that question. The principle announced could have acquired no additional potency by being repeated. We perceive no error in giving or refusing the instructions.

After a careful examination of the evidence we are of opinion that it sustains the verdict. Perceiving no error in this record the judgment of the court below is affirmed.*

Judgment affirmed.

TOLEDO, WABASH & WESTERN RAILWAY CO. *et al.*

v.

DAVID B. SMITH.

MEASURE OF DAMAGES—*pecuniary ability of the parties.* In an action against two or more to recover for injury to the plaintiff, wherein the plaintiff is entitled to exemplary damages by reason of the conduct of the defendants, which occasioned the injury, being wilful, wanton or malicious,

*TOLEDO, PEORIA & WARSAW RAILWAY COMPANY v. JOSEPH LAW. APPEAL from the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

MR. JUSTICE WALKER :

The facts in this case are substantially the same as those in the case of these appellants v. *Bray, ante*, and the questions presented in both are also the same. We, therefore, deem it unnecessary to again discuss the questions, and the judgment of the court below is affirmed for the reasons assigned in that case.

Judgment affirmed.

57	517
72a	214
57	517
98a	1 55

Opinion of the Court.

the pecuniary ability of one defendant should not be considered by the jury in determining the damages which a co-defendant shall have assessed against him.

APPEAL from the Circuit Court of Morgan county ; the Hon. CHARLES D. HODGES, Judge, presiding.

Mr. WILLIAM H. BARNES, for the appellant.

Messrs. MORRISON & WHITLOCK, for the appellee.

Per CURIAM : In this case the railway company and its conductor were sued for damages for the expulsion of appellee from the train.

Numerous errors have been assigned, both upon the evidence and the instructions. We shall consider only one instruction, for the giving of which the judgment must be reversed.

In the fourth of the series of instructions for appellee, the court informed the jury that in assessing damages against the defendants, it was proper for the jury to consider the ability of the company to pay damages.

The verdict was against both the company and the conductor, and they both prayed an appeal.

There is no proof in the record that Fray, the conductor, owned any property whatever. For aught that appears, he may have been hopelessly insolvent at the time of the trial.

The instruction referred to recognizes the principle that the pecuniary ability of one defendant may be considered by the jury in determining the amount of damages which a co-defendant shall have assessed against him.

The law is not so unjust and unreasonable. Even if the jury were satisfied in regard to the ability of the company, this would not enable them to determine the damages which should be awarded against the conductor. Evidence of the pecuniary ability of a defendant is admissible only in the class

Opinion of the Court.

of cases where the injury was wilful, wanton or malicious, and in which punitive damages may be allowed. The reason of the rule which authorizes a jury to take into consideration the pecuniary circumstances of a wrong doer, in fixing the amount of damages, in the class of cases mentioned, is, that a sum which would be a severe punishment to a man of small means, would be little or none to one of great means.

There was no evidence of the pecuniary ability of either of the appellants, and the question of such ability was, therefore, submitted to the jury without evidence. We can not say that this instruction, which was wrong in principle, was not calculated to prejudice appellants, and especially Fray. It would be natural for the jury to assume that the railway company was possessed of great means, simply because it was a railroad company, and nothing appearing to the contrary. But in this they might have been wholly mistaken. This supposititious or assumed wealth on the part of the company was made a basis of punitive damages against Fray, who might not have been worth a dollar.

That some such consideration must have entered into the question of damages, is quite apparent, from the amount of the verdict, which seems, under the circumstances of the case disclosed by the evidence, to have been largely in excess of any actual damages sustained by appellee.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Syllabus.

MARSTON HEFNER

v.

JAMES VANDOLAH.

1. ESTOPPELS IN PARS—and herein of the principles governing the same.

If a party make a declaration, or do any act to induce another to do an act that he would not otherwise do, or to invest his capital on the faith of such declaration or act, he will be estopped to deny the truth of his declaration, or the just effect of his act.

2. When a party is interrogated concerning a transaction which affects the interests of another, if he remains silent, or answers falsely, and if the other is misled thereby, such party will be held bound by his silence or his false declarations.

3. When a party is induced, by the acts or the declarations of another, to do an act he would not otherwise have done, or omits to do an act he would have done but for the conduct of such party, and injury results therefrom, the party who induced such action, or non-action, must be held responsible for the consequences.

4. The doctrine of estoppels *in pars* is to prevent injuries arising from acts or declarations which have been acted on in good faith, and which it would be inequitable to permit the party to retract. In order to create such an estoppel, the party estopped must have induced the other party to occupy a position that he would not have occupied but for such acts and declarations.

5. The conduct and representations must be such as would ordinarily lead to the results complained of. An act or declaration consistent with good faith, the injurious result of which could not have been foreseen or anticipated by any ordinary forecast of mind, would not operate as an estoppel, although injury may result therefrom to a third party.

6. But where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on the belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.

7. This doctrine of estoppel concerns conscience and equity, and the party that would avail of it must, himself, have acted in good faith towards the party on whose conduct he relied, or it will not be held to constitute a bar to the assertion of the truth.

APPEAL from the Circuit Court of McLean county; the Hon. S. L. RICHMOND, Judge, presiding.

57 520
29a 24857 520
42a 35457 520
70a 22857 520
76a 60557 520
194 1167

195 4580

57 520

110a 454
e110a 45557 520
114a 4485

This was an action on a promissory note, purporting to have been signed by Warren Coman and Marston Hefner, payable to James Vandolah, the plaintiff. Hefner alone was served with process, and pleaded the general issue, and also filed a special plea denying the execution of the note. The cause was tried by the court, a jury having been waived, and judgment rendered for the plaintiff. Hefner appeals.

Messrs. WILLIAMS & BURR, for the appellant.

Messrs. WELDON & BENJAMIN, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

It is conceded, that the signature to the note in controversy is not the genuine signature of appellant. The evidence abundantly establishes the fact that it is a forgery. The single question presented, is, whether the appellant, by his declarations and conduct, is estopped from denying the execution of the note.

There can be no controversy about the facts established by the evidence. The note upon which the suit was brought, bears date the 8th day of January, 1869, and purports to be signed by Warren Coman and the appellant, Marston Hefner. It was delivered to the appellee on or about the date of its execution, and was received by him in the usual course of business. The appellant and the appellee both reside in the neighborhood of Lexington, and both of them had been engaged in the stock business with Coman, either as partners or as joint operators, to a very considerable extent, previous to, and subsequent to the making of the note now in controversy. They were engaged in the same kind of operations, and their business necessarily threw them much together.

It is in evidence, that the appellee was at the house of the appellant, where Coman made his home, several times during the summer of 1869, to see Coman on his own business.

Opinion of the Court.

Although the note was delivered to the appellee about the time it bears date, and was made payable one day after date, yet it does not appear he ever called the attention of the appellant to it until some time in December, 1869. There is not the slightest evidence the appellant had any knowledge of the existence of the note, previous to that interview in December. It can not be said that anything the appellant did, induced the appellee to receive the note in the first instance, or induced him to hold it without instituting measures for its collection for that great length of time after its maturity.

The acts relied on to create an estoppel, occurred in December, after the note had been in possession of the appellee for about eleven months. At this time, both parties had become suspicious of Coman, and were fearful he would break up. In a conversation about his affairs, which occurred in a bank in Lexington, where the parties casually met, the appellee asked the appellant if he was aware he held Coman's note with his name on it, to which the appellant replied, that he was. The note was not present at that interview. There is but little conflict in the testimony of the parties as to what occurred at the interview in the bank. The appellant, however, insists, that when inquired of as to his knowledge of the note, he asked when the note was made, and on being informed, simply replied, that if the note was made then he must have signed it. This fact would not alter the law of the case. The appellant does not deny, that when he was asked if he was aware appellee held Coman's note with his name on it, he replied he was.

It is insisted, the appellee was misled to his injury by this declaration of the appellant, and was induced to sleep on his rights, and not to take any active measures to enforce the payment thereof, or even to secure his debt. It is apparent from the evidence, that Coman, at the time of the interview of the parties at the bank, was about to break up, and both parties were anxious to secure the amounts due them, or for which they were liable as the surety of Coman. It is admitted that

appellant, at that interview, told the appellee he thought the best way was not to press Coman, and that if he was let alone, he thought he would come out all right. It is insisted on the part of the appellee, that this declaration was made in bad faith, and made for the purpose of throwing appellee off his guard, with a view on the part of the appellant to obtain a better opportunity to secure his own claims, or those for which he was liable. On the contrary, the appellant insists it was simply an expression of an opinion on his part as to the best course to be pursued by both parties in reference to their relations with Coman, and was made in good faith, and for no sinister purpose. These are the main acts and declarations of the appellant, relied on to create the estoppel.

There can be no doubt, that if a party makes a declaration, or does any act to induce another to do an act he would not otherwise do, or to invest his capital on the faith of such declaration or act, he will be estopped to deny the truth of his declaration, or the just effect of his act. Such is the reasonable and just rule of the law. When a party is interrogated concerning a transaction which affects the interests of another, if he remains silent or answers falsely, and if the other is misled thereby, such party will be held bound by his silence, or his false declarations. Where a party is induced, by the acts or the declarations of another, to do an act he would not otherwise do, or omit to do an act he would have done but for the conduct of such party, and injury results therefrom, the party who induced such action, or non-action, must be held responsible for the consequences. If we apply these just principles in their fullest force to this transaction, would the admissions of the appellant, and the advice he gave the appellee concerning the best course to be pursued with reference to Coman, be sufficient in law to estop him from denying the execution of the note? This is the true inquiry in this case. As we have said, there is no pretence that the appellee was induced, by anything the appellant did, or said, to take the note in the first instance. If he is now to be estopped from denying the

execution of the note, and asserting the truth as against the appellee, it must be by the admissions made in the conversation in the bank, and the advice then given. No other acts are alleged, and none are proven.

The doctrine of estoppel *in pais* is to prevent injuries arising from acts or declarations which have been acted on in good faith, and which it would be inequitable to permit the party to retract. In order to create such an estoppel, the party estopped must have induced the other party to occupy a position he would not have occupied but for such acts and declarations. *Knoebel v. Kircher*, 33 Ill. 308.

The conduct and representations must be such as would ordinarily lead to the results complained of. An act or declaration consistent with good faith, the injurious result of which could not have been foreseen or anticipated by any ordinary forecast of mind, certainly ought not to operate as an estoppel, although injury may result therefrom to a third party.

Lord DENMAN, in *Pickard v. Sears*, 6 Adol. & El. 469, gave a very clear and accurate definition of this doctrine, where it is said, "The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on the belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."

We are unable to discover in the evidence, any act or declaration on the part of the appellant, the ordinary effect of which would have been to mislead the appellee to his injury, or which, in fact, did mislead him, or cause him to do, or omit to do, anything that resulted in injury or loss. The evidence does not disclose, that the appellee was placed in any different, or worse position, by anything that was said or done by the appellant, or by any admission he made, or by any advice that was given. The appellee himself does not testify he omitted to do any single act, or that he omitted to take any measures towards the collection or securing of his debt by reason of, or

Opinion of the Court.

in consequence of, such admission or advice. There is nothing in the entire evidence that would warrant the appellee, under the circumstances, to fold his hands and do nothing towards the collection and the securing of the debt. He had reason to believe Coman was about to become bankrupt; that subject was thoroughly canvassed by the parties.

It is suggested, in argument, that the appellee knew the appellant was amply responsible for the debt, and relying on that fact, and the admissions made by the appellant, he was induced to make no effort to collect his debt. This fact can not avail to aid the appellee's cause. He knew Coman was in failing circumstances; that the note had been due in his hands from ten to eleven months; that, at most, appellant was only surety on the note, and good faith towards the appellant ought to have prompted him to make every possible effort to make or secure the debt out of the principal before he became utterly insolvent.

The doctrine of estoppel insisted upon, concerns conscience and equity, and the party that would avail of it must, himself, have acted in good faith towards the party on whose conduct he relied, or it will not be held to constitute a bar to the assertion of the truth. *Preston v. Mann*, 25 Conn. 118.

We do not discover, that the advice the appellant gave concerning the course to be pursued with reference to Coman, caused the appellee to change his position in the least, or even caused him to omit any act he would have done but for that advice. There is nothing in the evidence to show, but that the advice was given in the utmost good faith; but if it was not, and a sinister purpose could be imputed, still, if the appellee was not induced by such advice to change his position, or act differently from what he otherwise would have done, the appellant is not responsible. *Starr v. Lourtee*, 17 Md. 341.

The case of *Lancaster v. Balzell*, 7 Gill & John. 468, is a stronger case than the one before us. The action in that case was by the indorsee, against the maker of a promissory note.

The latter, when applied to by the plaintiff for payment, replied, it was all right; that he would show he was entitled to certain credits, and that he would then settle the note. The first indorsement, the name of the payee, was a forgery. It was held, these facts did not estop the maker from interposing that defense.

In *Weaver v. Morrison*, 16 Ind. 344, it was held, that where the maker was informed that the note had been already purchased, and promised the assignee to pay it, he was not estopped to contest its validity, on the ground that the promise did not induce the purchase.

The case of *The Bank v. Hazard*, 30 N. Y. 226, to which our attention has been called by the counsel for the appellee, is not in point on the question involved in this case.

The case of *Petre v. Leiter*, 21 Wend. 172, is not illustrative of the one we are considering. That case simply holds, that where a maker of a note is present when the note is about to be purchased by a third party for a valuable consideration, and acknowledges his liability therefor, he is estopped to deny he made the admission in ignorance of the true state of facts. The case states a correct principle of law, but the facts are totally different from those presented in this record, and the principle, therefore, can have no application. If it appeared, that by the admission insisted upon, the appellee had been induced to receive the note in the first instance, the case would be in point, and would be authority.

We have carefully examined every case to which our attention has been called by the counsel for the appellee, and we do not find any of them to be in conflict with the views we have here expressed. So far as the principles contained in any of those cases have any application to the facts of this case, they fully sustain the views announced.

After a careful consideration of the whole facts in the record, we are of opinion that the finding of the court was contrary to the law and the evidence, and for the reasons indicated, the judgment must be reversed and the cause remanded.

Judgment reversed.

SAMUEL W. PUFFER

v.

JOHN SMITH.

FRAUD AND CIRCUMVENTION—*what constitutes.* In an action on a promissory note brought by an innocent assignee thereof, before maturity, for a valuable consideration, against the maker, it appeared the defendant was approached while at work in his field by two patent-right venders who proposed that he become agent for a cultivator and seeder, which they represented as possessing marvelous good qualities, and as the best in existence. He declined. They urged, lauding the machine, and representing the profitable character of the undertaking. He finally assented to accept the agency, when a paper purporting to be a contract between the parties was read to him by one of the men, which he without reading signed. The defendant was no scholar and could not read much. The paper was a long one, and he did not know whether he signed it in the middle or at the end. There was no consideration given, and no machine ever sent to the defendant. The note sued upon, it seems, was in some way incorporated in this paper, and under the circumstances, was regarded as having been obtained by such fraud and circumvention as precluded a recovery.

WRIT OF ERROR to the Circuit Court of Scott county; the Hon. CHARLES D. HODGES, Judge, presiding.

This was an action brought by Puffer against Smith, on a promissory note alleged to have been executed by the defendant. As a defense, it was alleged, the signature of the defendant was obtained to the note through fraud and circumvention. The plaintiff held the note as assignee before maturity, for a valuable consideration, and without notice of the alleged fraud used in obtaining its execution. A trial by jury resulted in a verdict and judgment for the defendant. The plaintiff brings the record to this court, and asks a reversal of the judgment.

Mr. H. CASE, Mr. N. M. KNAPP, and Mr. W. C. WILKINSON, for the plaintiff in error.

Messrs. CHAPMAN & HENDERSON, for the defendant in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

This was an action of *assumpsit*, by the assignee of a promissory note against the maker. The pleas were, non-assumpsit, *non est factum* verified by affidavit, and a special plea alleging fraud and circumvention in obtaining the execution of the note.

The evidence is conflicting ; and doubts naturally arise, as to the credibility of some of the witnesses, upon reading the testimony as presented in the record.

The only witness examined, who was present at the time of the alleged execution of the note, was the defendant in error.

We learn from his evidence that two men, belonging to a numerous class of patent right venders who infest the country, came upon him in his field, and proposed to him that he become an agent for a cultivator and seeder, possessing marvelous good qualities, indeed the very best in existence. He declined ; they urged, lauding the machine, and representing the profitable character of the undertaking. Finally he assented to accept the agency, and a paper, purporting to be a contract between the parties, was read over by one of the men, and signed by defendant in error. He did not read it ; was no scholar, and could not read much. The paper was a long one. Did not know whether he signed it in the middle or at the end.

The reasonable inference is, that the note sued on was the result of deception and trick, practiced upon the defendant in error. There was no consideration given, no machine delivered, no circumstance to relieve the transaction from the baldest fraud and circumvention.

It was the peculiar province of the jury to determine the credibility of the witnesses. If defendant in error was credited, there could be no doubt as to the propriety of the finding of the jury in his favor.

Complaint is made of the instructions. The first instruction for defendant in error is not formally correct, nor very

intelligible. There are slight errors in others. In reviewing, however, all the instructions in connection with the evidence, we can not perceive that the jury was confused or misled by them.

The verdict was right and ought not to be disturbed. The judgment is affirmed.

Judgment affirmed.

ASAHEL GRIDLEY

v.

SAMUEL T. BANE.

FRAUD AND CIRCUMVENTION—*by whom the fraud must be perpetrated to render the defense availing.* An assignee before maturity of a promissory note, purporting to have been executed by several, brought suit thereon against one of the makers, who pleaded that one of the principal makers had induced him to join in the execution of the note, on the representation that another person had already signed the same, when in fact the signature thereto of such other person was a forgery: *Held*, that the plea was at least defective for this, if for no other reason, that it did not aver that the payee or the assignee of the note was privy to the alleged fraudulent or false representation.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

MR. E. M. PRINCE and Messrs. WILLIAMS & BURR, for the appellant.

MR. M. W. PACKARD, for the appellee.

MR. JUSTICE SHELDON delivered the opinion of the Court:

This was an action upon a promissory note, purporting to be executed by J. C. Pierson, J. S. Pierson and Samuel T. Bane, jointly and severally, to J. H. Cheney, and indorsed by Cheney to appellant before maturity.

34—57TH ILL.

Bane alone was sued; and the only question is, upon the sufficiency of his second plea, a demurrer to which was overruled.

- The plea avers that defendant's signature was obtained by said J. C. Pierson to said note through fraud and circumvention in this: That said J. C. Pierson came to the defendant to get him to sign said note with him, the said J. C. Pierson, and he told and represented to the defendant, that James S. Pierson had signed the same, which representation the defendant believed, and he thereby induced defendant to sign the said note, when, in fact, the said James S. Pierson never did sign said note, but that his signature thereto is a forgery.

The plea is at least defective for this, if for no other reason, that it does not aver that Cheney, the payee, or Gridley, the assignee of the note, was privy to the alleged fraudulent or false representation of J. C. Pierson.

In the case of *Young et al. v. Ward*, 21 Ill. 223, the plea set up that the defendant was induced to sign the note on the fraudulent assurance of Reim, the principal in the note, that certain other persons would also sign it; and the court there held, that the plea disclosed a state of facts, which, if true, most clearly constituted a fraud perpetrated on the defendant by Reim—but that the plea was bad, because it did not allege that the payee of the note participated in the fraudulent representations made by Reim, or took the note with knowledge that they had been made. A subsequent surety is not to be discharged because the name of a prior one has been forged. *York Co. M. F. Ins. Co. v. Brooks*, 51 Maine, 506.

It was held in *Selan v. Brock*, 3 Ohio State R. 302, that one who signed a note apparently as principal, but who was in fact a surety within the knowledge of the holder, and affixed his signature after the names of others as signers had been forged upon the note, and while it was in the hands of him for whose benefit it was drawn, so far sanctioned and affirmed the genuineness of the signatures, that he could not take advantage of the fraud in his defense against the holder,

unless he showed the holder was privy to the fraud. 1 Parsons on Notes and Bills, 235.

The demurrer to the plea should have been sustained.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ELI ULERY

v.

AARON H. GINRICH.

57	531
83a	501
57	531
202	1460
57	531
114a	282

PARTNERSHIP—*power of the several partners to give promissory notes in the name of the firm.* While in the case of commercial partnerships each partner may execute promissory notes and other negotiable securities, in the name of the firm, or do any other acts which are incident or appropriate to such trade or business, according to the common course and usages thereof, yet where the partnership is organized for farming purposes, the partners do not, as incident thereto, possess a power to draw or accept bills, or to draw or endorse notes for the firm. In such cases there must be some proof that an express authority is given for this purpose, or that it is implied by the usages of the business, or the ordinary exigencies and objects thereof.

APPEAL from the Circuit Court of Macon county ; the Hon. A. J. GALLAGHER, Judge, presiding.

This was an action of assumpsit, brought by Ginrich upon a promissory note executed in the firm name of Ulery & Hudgins, and also by Owen J. Doyle and Isaac Wilson.

It appears the firm name of Ulery & Hudgins was signed by the latter, and among other pleas the defendant Ulery, by his third plea, which was verified by affidavit, denied the existence of the partnership at the time the note was executed,

and, denied the authority of Hudgins to execute the same in the name of the firm. Issue was formed upon this plea, and a trial had which resulted in a verdict and judgment in favor of the plaintiff.

The nature and objects of the partnership between Ulery and Hudgins, were as follows: They rented a farm for the express purpose of cultivating the same. It was agreed between them that Ulery should furnish the money to run the farm and to buy whatever stock they might wish to put on it to feed the proceeds of the farm to, and Hudgins was to superintend the farm, and give his time and labor in the business of the farm, and they were to divide the profits. They agreed that their partnership was restricted to the farm, and that Hudgins should contract no debts, and that neither of them should have authority to make notes or other evidences of indebtedness in the name of the firm.

The note in suit was given for money borrowed by Hudgins, without the knowledge of Ulery, a part of which he states he applied to the payment of debts of the firm which he had created, and used a portion on his own private account.

The principal question presented is, as to the authority of Hudgins to give the note in the name of the firm.

Messrs. BUNN & BUNN, for the appellant.

Messrs. CREA & EWING and Messrs. NELSON & ROBY, for the appellee.

Per CURIAM: The third plea of appellant, sworn to, put in issue the existence of a partnership on the 15th of April, 1867, the day the note in suit was executed. It was proved by a great preponderance of evidence, in the proportion of four to one, and that one the party who executed the note in the firm name, that the copartnership which had been formed in the fall of 1864, to purchase and sell cattle and other stock, was ended in the spring of 1866, about the close of the month

of May of that year. This fact is well established, and the verdict is against the weight of evidence.

In regard to the arrangement between appellant and Hudgins to carry on the farm in 1867, it is not claimed, by force of that, Hudgins had any authority to execute the note in question. In ordinary commercial partnerships each partner has undoubted authority to buy and sell goods belonging to or for the use of the partnership, or ordinary business thereof; each partner may pledge the partnership property, or borrow money for partnership purposes, and draw, negotiate, accept or endorse bills of exchange and promissory notes and checks, and other negotiable securities, or any other acts which are incident or appropriate to such trade or business, according to the common course and usages of such trade and business, but the same rule does not always prevail in all other sorts of partnership, or in such as are of a special and peculiar nature. Thus, if a partnership is organized for mining, or for farming purposes, the directors or active agents thereof will not, as incident thereto, possess a power to draw or accept bills, or to draw or endorse notes for the company. In such cases there must be some proof that an express authority is given for this purpose, or that it is implied by the usages of the business or the ordinary exigencies and objects thereof. Story on Part., sec. 102, 126; Collyer on Part., book 3, ch. 1, sec. 2, p. 269.

In the farm partnership, that was confined to cultivating the farm, appellant to furnish the money and Hudgins to superintend the operations, and give his time and labor in the business, and instead of authority in Hudgins to execute notes to bind the partnership, it is expressly proved that it was agreed Hudgins should contract no debts, and that neither of them should have authority to execute notes or other evidences of indebtedness in the name of the partnership.

With these views, the court should have given the second and third instructions, as asked by appellant, without the modification or qualification added by the court.

Syllabus.

The two last instructions asked by the appellant and not numbered, should also have been given, as they announce the law of this case.

For the reasons given the judgment is reversed and the cause remanded.

Judgment reversed.

JOHN GATES *et al.*

v.

GEORGE HACKETHAL.

57 534
44a 586

1. **CONSIDERATION**—*agreement for an extension of time.* If a debtor gives his note for an additional sum, upon an agreement for an extension of time for the payment of the original indebtedness, but the agreement specifies no time for such payment, so that it may still be enforced presently, there will be no consideration for the new note.

2. **USURY**—*what constitutes.* A purchaser of land being unable to meet his payments promptly, executed to his vendor a new note, payable in gold coin, or in United States treasury notes with a premium to be added equal to the difference between the value of gold and treasury notes, on a certain day, which was largely more than the rate of interest allowed by law. The original contract was payable in treasury notes: *Held*, the new note was usurious, as it gave to the vendor more than the legal rate of interest.

3. **CONSIDERATION**—*want of.* Where the maker of a promissory note, which is payable in United States treasury notes, not being able to meet the same at maturity, gives another note to his creditor, payable in gold, in order to secure the latter against any loss by reason of the depreciation of treasury notes after the maturity of the original note, and before its payment, the second note given for such purpose will be without consideration.

APPEAL from the Circuit Court of Madison county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Mr. DAVID GILLESPIE, for the appellants.

Messrs. DALE & BURNETT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

It appears that appellant Gates, in February, 1864, sold to appellee a farm for the sum of \$10,000, payable \$400 in hand, \$5,600 on the first of April following, \$2,000 at one year from the 24th of February, 1864, and \$2,000 two years from that date, the deferred payments to bear ten per cent interest, and to be secured by deed of trust. The first payment was made, the notes and deed of trust were executed and delivered according to the agreement, and Gates executed a conveyance of the farm.

When the first note fell due, appellee, having been disappointed in getting his money from Germany, was unable to meet it, and it was agreed that Gates should not sell the farm under the deed of trust, and appellee was to pay him in gold, or its value on the first day of April, 1864, in United States treasury notes ; and appellee then gave to Gates another note for \$5,600, in coin, or in treasury notes with the premium that coin was worth at that date ; in the following August, appellee paid the note first falling due, with interest, and it was surrendered up to him.

In December, 1866, appellee paid to appellant Gates, \$4,750, which appellee claims he directed to be paid on the two notes of \$2,000 each, but that appellant Gates retained \$1,200 as a premium on gold, on the first day of April, 1864, which he claimed was due to him on the note falling due on that date, and then applied the remainder of the sum then paid, on the two notes he still held. Appellant, on the other hand, claims, that when the payment was made in December, 1866, it was through the sons of appellee, and that he then settled with them, and they agreed the money should be applied in the manner he adopted, and they agreed that \$1,200 should be the amount of the premium on the gold. This \$1,200 produces this controversy.

It is claimed by Gates, that it was paid in consideration of an extension of time for the payment of the first note. On the

Opinion of the Court.

other hand, it is insisted, that it was an usurious transaction, and that there was no other consideration for the agreement. It seems to be clear, that the note for \$5,600, and the agreement, as it is called, of April 1st, 1864, are for one and the same sum of money; about this, there is no dispute; and it would seem, that when the note with interest was paid in full, and it was surrendered up, the whole debt was paid and discharged. The note or agreement of April 1st being for the same debt, and not made, or intended, to be a discharge of the other, was only collateral to it; and when the principal was paid, the presumption would be that the collateral would be discharged.

It appears, from all the evidence, there was no claim for any sum, as premium, when the note was delivered up to the maker. It seems to us, that as the note was secured and the agreement was not, Gates would then, as he did subsequently, when he says a new note was offered for the last note falling due, have refused to release his security for the \$1,200, if he regarded it as due him. Why did he not, as he did when the last payment was made, deduct the \$1,200 and credit the balance? He says it was because one of the sons of appellee promised to pay it when his father's money came from Germany. He was, as he says, unwilling to receive a new note subsequently, because it would have been without security, and he fails to explain why he was willing to permit the \$1,200 to remain unsecured.

The note of February 24th, and the note of April 1st, being for the same indebtedness, given at different times, the question is presented as to what was the consideration of the latter. Gates says it was for an extension of time to pay the money on the note already due. We fail to find any agreement proved, that any specific time was agreed upon. From the evidence contained in the record, we fail to perceive there was an agreement that would have prevented Gates from suing on the note of February, at any time. The note of April 1st specifies no time for payment, and being a promise generally,

Opinion of the Court.

the law would presume it was payable on demand. This being the legal effect of the note, it was not based on any consideration. It in nowise changed the rights or liabilities of the parties. Had Gates, on delivery of the new note to him, at once demanded its payment, it would have thereby become due. There was not, therefore, an extension of the time of payment, and hence, no new consideration to support the agreement. It was usurious, as it attempted to give appellant more than the legal rate of interest. Or, if we take the other explanation of Gates, that his object was to avoid loss by the depreciation of treasury notes after the maturity of the note, and before its payment, we fail to perceive any consideration to support the new agreement. It appears, that the sale was made for treasury notes, and the price of the land was fixed and agreed upon with reference to payment in such funds. This being the case, and appellant still treating the first note as being so payable, the effect was to render the note payable in a different and more valuable medium—to increase its value—because, when the new note was made, it is conceded that treasury notes, at their par value, would have discharged the debt, and this was some time subsequent to its maturity. Again, had treasury notes appreciated to the standard of gold before payment was made under the new note, appellee was required to pay the amount of treasury notes that gold would have purchased on the first of April. This was an effort to change the contract essentially, and without any consideration, as we have seen. If valid, it would have changed the character of the contract, given Gates new and valuable rights not possessed under the original note, and without any benefit to appellee. We are, therefore, of opinion, that the new note was not binding, and conferred no rights.

It follows, that the account was correctly stated in the court below, and the decree is right, and must be affirmed.

Decree affirmed.

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ABATEMENT.

PLEA IN ABATEMENT.

1. *Sending process to a foreign county.* The defendant in an action of assumpsit commenced in the county of Cook, pleaded in abatement that, at the time of the commencement of the suit, he was a resident of McDonough county, and had been ever since; that he was not found or served with process in the county of Cook, but that he was served with process in the county of McDonough; that the cause of action arose in the county of McDonough, and not in the county of Cook; that the contract upon which the action was brought was not actually made in the county of Cook, and that the same was not, nor any part thereof, made specifically payable in the said county of Cook: *Held*, on demurrer, the plea negatived every material fact necessary to give the court jurisdiction of the person, and was sufficient. *Humphrey v. Phillips et al.* 132.

2. *Surplusage.* The clause in the plea which alleged "the cause of action arose in the county of McDonough, and not in the county of Cook," presented an immaterial issue, under the act of 1861, and might be rejected as surplusage. *Ibid.* 132.

3. *Middle initial letter in a name.* The omission, in such a plea, of the middle initial letter in the name of the plaintiff, is of no importance, it not being regarded as any part of the name. *Ibid.* 132.

4. *Whether certain facts should be negatived.* Where the record shows affirmatively that there was only one defendant, and that the suit was not brought under the attachment laws of the State, it is not necessary to allege those facts in the plea. *Ibid.* 132.

5. *Whether an answer to several counts.* A declaration in assumpsit contained three counts: a special count on a sight draft, and two common counts. A plea in abatement, alleging "that the contract upon which the action was brought was not actually made in the county" in which the action was brought, "and that the same was not, nor any part thereof, made specifically payable in" that county, was held sufficient as an answer to the whole declaration. The term *contract*, as used in the plea, could be held to apply to the contract declared on in the several counts, or to each contract in the several counts. *Ibid.* 132.

ABATEMENT. PLEA IN ABATEMENT. *Continued.*

6. *Whether aided by stipulation.* However, a plea can not be aided in that regard, by reference to a stipulation that the contract embraced in the special count was the sole cause of action relied on. The effect of such stipulation would be simply to limit the proof to that cause of action. *Humphrey v. Phillips et al.* 182.

7. *Degrees of strictness required.* Such great strictness has never been required in pleas in abatement of this character as in pleas properly to the jurisdiction of the court. *Ibid.* 182.

ACTIONS.**SPLITTING A CAUSE OF ACTION.**

1. A cause of action arising upon a contract which is an entirety, can not be severed by means of partial assignments, so as to become the foundation of several suits instead of one. *Chicago & Northwestern Railway Co. v. Nichols et al.* 464.

ACTION ON GUARDIAN'S BOND.

2. *When it may be brought.* Upon objection that a suit could not be maintained upon a guardian's bond, until there had been a settlement in the court of probate, an order by the court fixing the sum due and directing its payment, and a refusal by the guardian to pay, it was held, the guardian could not prevent an action on the bond by refusing or failing to render an account; that whenever he committed a breach of any of the conditions of the bond, he was liable to an action, and that, the declaration averring the removal of the guardian, the appointment of a successor, the making of an order by the probate court directing the guardian to pay and render to his said successor all moneys in his hands, with a breach that he did not so render and pay as directed by said court, on which breach issue was joined that he did render and pay to his successor, etc., it was immaterial, under the issue, whether he had had a final accounting with the court or not. *Wann et al. v. The People, use, etc.* 202.

TO RECOVER PURCHASE MONEY.

After rescission. See **PURCHASE MONEY, 1.**

GRADE OF STREETS IN A CITY.

Liability of the city for injury to individuals in respect thereto. See **HIGHWAYS, 4 to 7.**

TOWNSHIPS—NEGLECT OF HIGHWAYS.

Whether liable to a private action therefor. Same title, 9.

ADMINISTRATION OF ESTATES.**APPLICATION TO SELL LAND TO PAY DEBTS.**

1. *Where all the heirs are not parties—effect thereof.* Although part only of the heirs of a deceased person are made parties to a proceeding to sell real estate to pay debts of the intestate, still the court will

ADMINISTRATION OF ESTATES. APPLICATION TO SELL LANDS TO PAY DEBTS. *Continued.*

acquire jurisdiction of the subject matter, as the statute does not require all parties in interest to be before the court before it can acquire such jurisdiction. It is the death of the party seized of real estate, the grant of letters testamentary or of administration, his indebtedness, and filing the petition, which confers jurisdiction. It is necessary to make all persons in interest parties, that their rights may be adjusted, and it may be error not to do so, but that does not defeat the jurisdiction of the court. A decree in such a case is binding on the parties to it. *Botsford v. O'Conner et al.* 72.

2. *Where the administrator was also guardian.* When the administratrix was also guardian of the heirs, whose property she applied for leave to sell, such fact, if illegal, would not prevent the court from acquiring jurisdiction, and the fact that she, as guardian, was not made defendant, if erroneous, did not go to the jurisdiction. *Ibid.* 72.

3. *Notice of the proceeding—necessity thereof, and how the fact must appear.* In a proceeding in the circuit court by an administrator, for an order to sell the lands of his intestate to pay debts, a decree was entered reciting service of notice, but the recital itself showed the service was defective. That decree was afterwards set aside, the petition amended by substituting other lands, and another decree rendered, without, however, any new adjudication upon the fact of notice, nor did it appear anywhere in the proceedings that any other notice had been given than that recited in the first decree: *Held*, in a collateral proceeding, the presumption was, that the second decree was made under the notice referred to in the former decree, which being defective, the court failed to acquire jurisdiction of the person of the heirs. *Donlin v. Hettinger et al.* 348.

4. In a proceeding of this character, unless the mode pointed out by the statute for bringing the parties before the court is pursued, there will be such a want of jurisdiction as will vitiate the order of sale. *Ibid.* 348.

NOTICE OF ADJOURNMENT OF SALE.

5. The omission of an administrator to re-advertise the property for an adjourned sale, does not render the sale void. The 106th section of the Statute of Wills imposes a penalty for failing to comply with the statute, in making such sales, but declares such omission shall not be sufficient to defeat the sale. *Botsford v. O'Conner et al.* 72.

COMPELLING AN ADMINISTRATOR TO PAY DEBTS.

6. *Power of imprisonment.* The county court has power to imprison an administrator for non-payment of a claim against the estate, under certain circumstances, but it does not follow that the court may imprison for another cause. The court could not imprison an administrator for non-payment of a claim, when he has no money of the estate in his hands. *Von Kettler et al v. Johnson*, 109.

ADMINISTRATION OF ESTATES. COMPELLING AN ADMINISTRATOR TO PAY DEBTS. *Continued.*

7. To authorize the court to order the imprisonment of the administrator, it must first ascertain the amount of money in the hands of the administrator, belonging to the estate, and the amount of debts allowed against the estate, and, if sufficient, order the payment of the debts in full. When the order of payment has been made, a demand of the administrator should be made, and if payment be not made within thirty days from that time, then, and not till then, can the creditor move for an attachment. *Von Kettler et al. v. Johnson*, 109.

8. The power to enforce obedience to an order of court for the payment of money, by imprisonment, is the highest power known to the law, and a party, seeking such a remedy, can not be heard to complain if he be required to strictly pursue the law conferring authority thus to proceed. County courts, when they attempt to enforce compliance with their orders, by imprisonment, should always act with caution, and strictly observe the requirements of the statute. *Ibid.* 109.

ADMISSIONS. See **ESTOPPEL**, 1, 2.

AFFIDAVIT OF MERITS.

IN THE SUPERIOR COURT OF CHICAGO. See **PRACTICE IN THE SUPERIOR COURT OF CHICAGO**, 1.

AGENCY.

WHAT WILL CONSTITUTE AN AGENT.

1. *In respect to the possession of chattels.* See **MORTGAGES**, 14.

POWERS OF AN AGENT—HOW ASCERTAINED.

2. *When authority is conferred by writing, how his powers are to be ascertained.* It is a general rule, that where an agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and can not be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers; because that would be to contradict or vary the terms of the written instrument. *Hartford Fire Insurance Co. v. Wilcox*, 180.

3. But the doctrine in each case must be understood with the qualifications and limitations properly belonging to it, and the usages of a particular trade or business, or of a particular class of agents, are properly admissible, not for the purpose of enlarging the powers of the agents employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially commercial agents. *Ibid.* 180.

AGENCY. POWERS OF AN AGENT—HOW ASCERTAINED. *Continued.*

4. *Enlargement of written authority—when shown by parol.* Although in general, the maxim is true, that where an express power is conferred by writing, it can not be enlarged by parol evidence—or an authority be implied where there exists an express one—yet the maxim is applicable only to cases where the whole authority grows solely out of the writing, and the parol evidence applies to the same subject matter at the same point of time, and therefore, in effect, seeks to contradict, vary or control the effect of the writing. Where parol evidence seeks to establish a subsequent enlargement of the original authority, or to give an authority for another object, or where the express power is engrafted on an existing agency, affecting it only *sub modo* to a limited extent, the maxim loses its force and application. *Hartford Fire Insurance Co. v. Wilcox*, 180.

5. *Where written authority of, is enlarged by the declarations and conduct of his principal.* And where there was a written authority to the agent, but the principal, by his declarations and conduct, has authorized the conclusion that he had, in fact, given more extensive powers to the agent than were conferred by the writing, then, as to all persons dealing with such agent upon the faith of such apparent authority, the principal will be bound to extent of such apparent authority. *Ibid.* 180.

AUTHORITY CONFERRED ON SEVERAL.

6. *All must concur in its exercise.* It is a general rule of the common law, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal, only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint, and not several. *Ibid.* 180.

7. *Power of the survivor.* And where a commission vests power in two, without words of survivorship, and one of them dies, unless there is a subsequent recognition by the principal of the survivor as agent, his acts will not bind the principal. *Ibid.* 180.

PROOF OF AUTHORITY.

8. *When in writing—must be proved.* If the authority of the agent is in writing, the *writing* must be *produced* and proved. *Ibid.* 180.

MUST KNOW AUTHORITY OF AGENT.

9. A person purchasing of an agent is bound, at his peril, to see that the agent has authority to make the sale. *Davidson v. Porter et al.* 800.

10. *Purchaser from swamp land commissioner—must know his authority.* The authority of a swamp land commissioner, as agent of a county holding such lands, being a matter of law and public record, a purchaser from such commissioner will be presumed to know the extent of the agent's authority in the premises. *Dart v. Hercules et al.* 446.

AGENT EXCEEDING HIS AUTHORITY.

11. *Whether principal bound.* It is a general rule, that if a special agent, whose authority is conferred by statute or orders of court, acting

AGENCY. AGENT EXCEEDING HIS AUTHORITY. *Continued.*

in the capacity of a public officer, with limited and well defined powers, acts outside of the authority conferred, the principal will not be bound by his acts. *Dart v. Hercules et al.* 446.

AGENT FOR SALE OF REAL ESTATE.

12. *Whether entitled to commission.* A authorized B, as real estate agent, to sell for him twenty-one acres of land, at \$1500 per acre, B to receive a commission of 2 1-2 per cent on the sale. B afterwards received of a party \$1000, and gave a receipt therefor, in the name of A, by himself, which was to be applied as a part of the purchase money, if the party should finally become the purchaser of the land, but if he failed or refused to consummate the purchase within a specified time, he giving no obligation of any kind binding him to make the purchase, then the \$1000 deposit was to be forfeited. The trade was never consummated: *Held*, in an action by A against B, to recover the \$1000 forfeited, the latter contending that he was entitled to the money as commission on the sale at \$31,500, that at most, he was only entitled to the commission on the deposit. *Pierce et al. v. Powell*, 323.

SALE BY AGENT OF A TRUSTEE.

Whether proper, and who may question it. See TRUSTS AND TRUSTEES, 10.

OF INSURANCE AGENTS.

And how far their action is binding on their principals. See INSURANCE, 6.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 1 to 5.

AMENDMENTS.**OF SHERIFF'S RETURN.**

1. The true rule of practice is, that the court should grant leave to a sheriff to amend his return to process as a matter of course, and without notice to the party to be affected by it, only during the term at which the cause is determined. *O'Conner et al. v. Wilson et al.* 226.

2. *Former decisions.* The cases of *Turney v. Organ*, 16 Ill. 43, *Dunn v. Rodgers*, 43 Ill. 260, *Moore v. Purple*, 3 Gilm. 149, and *Morris v. The Trustees of Schools*, etc., 15 Ill. 266, in so far as they announce a different rule, modified. *Ibid.* 226.

3. *By whom amendment to be made.* Where the return of service, upon a summons, made by a deputy sheriff, who had since died, was thought to be defective, it not appearing that his principal was present at the execution of the writ, and cognizant of the manner in which the service was made, and there being no sufficient memorandum made by the former at the time the service was had by which the amendment could be made, it was *held* incompetent for the latter to amend the return. *Ibid.* 226.

AMENDMENTS. OF SHERIFF'S RETURN. Continued.

4. Inasmuch as the return to process can only be amended by the facts, the amendment should be made by the officer who served the writ and knows the facts, or if by his principal, then from a memorandum made by the deputy at the time he served the writ, and which clearly and unmistakably states the facts omitted in the return. *O'Connor et al. v. Wilson et al.* 226.

5. *Presumption as to who served a writ.* See PROCESS.

6. *Officer disqualified to amend return, by interest.* 'The law has prohibited a sheriff from executing process in a case in which he has an interest. So, where service of a summons was made by a deputy sheriff, and the return to the process was insufficient to confer jurisdiction of the person of the defendant on the court, it was *held*, his principal, having afterwards become interested as warrantor of property sold under a judgment obtained by virtue of the proceeding, his wife, having purchased from the purchaser at the execution sale, a portion of the land sold, and he joined with his wife in a warranty deed conveying the same to another, could not properly amend the return even if in possession of the requisite facts concerning the manner of the service. *Ibid.* 226.

7. *Jurisdiction in equity to relieve against improper amendment.* And the sheriff, by leave of the court, after his term of office had expired, having made such improper amendment, so as to obviate the objection as to jurisdiction, and it appearing he was insolvent, a court of equity had jurisdiction, upon bill filed for that purpose, to relieve the defendant in the original proceeding from the effect of the amended return—the same, under such circumstances, being fraudulently made, and operating as a cloud upon his title, and there being no adequate remedy at law. *Ibid.* 226.

8. *Laches.* Where the application to amend was not made until nearly twelve years after the date of the return, it was *held*, that after the lapse of so long a time, leave to the officer to amend his return should not be granted. *Ibid.* 226.

AMENDMENT OF BILL IN CHANCERY

9. *When allowable.* As a general rule, amendments to the pleadings in chancery are in the discretion of the circuit court, and, when permitted for the furtherance of justice, the opposite party can not be heard to complain unless he can show his substantial rights have been prejudiced thereby. *Hewitt et al. v. Dement et al.* 500.

10. In this case, the complainant was allowed to so amend his bill upon the argument of the cause as to adapt the pleadings to the proofs of the defendant already in. There being obviously no delay occasioned, and it not appearing the defendant was in any manner surprised

AMENDMENTS. AMENDMENT OF BILL IN CHANCERY. *Continued.*

thereby, the amendment was regarded as properly allowed. The 84th section of the chancery act provides that the circuit courts, when sitting as courts of equity, may permit the parties to amend their bills, petitions, pleas, etc., on such terms as the court may deem proper, so that neither party be surprised or delayed thereby. *Hewitt et al. v. Dement et al.* 500.

APPEALS.**WHETHER AN APPEAL WILL LIE.**

1. *Condemnation of right of way, under law of 1859.* Where a corporation is formed, under the general law of 1859, for the purpose of constructing plank, gravel or macadamized roads, and authorized to condemn lands therefor, by presenting a petition to a judge of a court of record for the appointment of commissioners for the purpose, and where commissioners have been thus appointed and returned their report into court, and it has been approved by the court, the order of approval becomes a final judgment, from which an appeal lies to this court, notwithstanding the act providing for the condemnation is silent as to an appeal or writ of error. *Skinner et al. v. Lake View Avenue Co.* 151.

2. Where, under the statute, the petition was presented to the court, commissioners were appointed, made their report, the clerk recorded the orders, and the court confirmed the report: *Held*, this constituted a condemnation of the land by which the title passed to the corporation. Such a judgment relates to a freehold and is within the constitution and statute which authorizes an appeal. *Ibid.* 151.

RIGHT OF APPEAL, GENERALLY.

3. In cases in which the statute declares the action of an inferior tribunal to be final, and prohibits an appeal or writ of error, such action must be held conclusive, unless it violates a constitutional right. But parties have the right of appeal from the circuit to the supreme court, where the judgment or decree is final and relates to a franchise or freehold. *Ibid.* 151.

TO THE CIRCUIT COURTS.

4. A judgment before a justice of the peace is final unless the law gives an appeal. The circuit courts have no inherent power to try appeals from inferior tribunals, and can only entertain them by virtue of statutory power. *Ibid.* 151.

ASSESSMENT OF DAMAGES.

ON DISSOLUTION OF INJUNCTION, See INJUNCTIONS, 7 to 11.

ASSESSMENTS, SPECIAL. See SPECIAL ASSESSMENTS.

ASSIGNMENT.**REMEDY OF AN ASSIGNEE.**

1. *Of a contract for the manufacture of certain articles, and assignment thereof—remedy of the assignee.* See **CHANCERY**, 1.

OF PARTIAL ASSIGNMENTS.

2. *Can not sever a cause of action.* See **ACTIONS**, 1.

ATTACHMENT.**MALICIOUSLY SUING OUT ATTACHMENT.**

Remedy therefor. See **CASE**, 1.

ATTACHMENT OF BOATS AND VESSELS.**UNDER ACT OF 1857.**

1. *When the lien accrues.* Under the act of February 16th, 1857, relative to the liability of vessels for debts contracted on account thereof, there exists a lien on such vessels in favor of the material-men, for the supplies furnished, from the moment the liability therefor is incurred. Such lien is acquired by force of the statute, and not by virtue of the levy and seizure under the attachment warrant, which is the remedy provided for the enforcement of the lien, and does not create the lien. *Barque "Great West No. 2" v. Oberndorf et al.* 168.

2. *Of the priorities of liens, and time of enforcing them.* The act of 1857 must be construed in connection with the act of 1845, to which it is an amendment, and which expressly provides, that such debts shall have the preference of all other debts due from the owners or proprietors of boats and vessels of all descriptions * * * running upon any of the navigable waters within the jurisdiction of this State, excepting the wages of mariners, etc., which are to be first paid; and in connection with the act of 1855, which extends the time for enforcing such liens as against other creditors, or subsequent incumbancers, and *bona fide* purchasers, from three to nine months. *Ibid.* 168.

3. But such liens can not take priority over previous incumbrances, such as judgments and mortgages, but can only prevail as against debts and demands for which there exists no prior lien. *Ibid.* 168.

4. *Former decisions.* The cases of *Williamson v. Hogan*, 46 Ill. 504, and *The Tug Montauk v. Walker & Co.* 47 Ill. 335, so far as they hold that, under the act of 1857, no lien is expressly created against vessels by the contract for furnishing supplies, and in furnishing them, are overruled. *Ibid.* 168.

ATTORNEY'S FEES.**ASSESSMENT OF DAMAGES.**

On dissolution of injunction—of the allowance of attorney's fees. See **INJUNCTIONS**, 7 to 10.

AUDITOR OF PUBLIC ACCOUNTS.**OF HIS POWER TO LEVY TAXES.**

To pay interest on bonds of municipal corporations, under act of April 16, 1869. See TAXATION, 10.

AURORA, CITY OF.**SPECIAL ASSESSMENTS THEREIN.**

Not collectible out of personal property. See SPECIAL ASSESSMENTS, 9 to 13.

BANKER.**LIABILITY FOR SPECIAL DEPOSIT.**

1. If a sole party, as a banker, receive stock or coin upon special deposit, and it be embezzled by his own clerk or cashier, then, although that would be a wrongful conversion of the property, still it would not be the act of the banker, nor would he be liable for such conversion, unless he participated in it, or was guilty of gross negligence, and the same rule would apply in case of a firm of bankers. *Sturges et al. v. Keith*, 451.

BURDEN OF PROOF. See EVIDENCE, 17; REPLEVIN, 1.

CASE.**WHEN THE ACTION WILL LIE.**

1. *For maliciously suing out a writ of attachment.** An action on the case will lie for maliciously suing out an attachment and seizing the goods of the debtor, even though there was at the time some indebtedness. The party injured in such case is not restricted to a suit on the attachment bond. *Spaids v. Barrett et al.* 289.

CERTIFICATE OF PUBLICATION.**IN THE MATTER OF A SPECIAL ASSESSMENT.**

Of the sufficiency of the certificate. See SPECIAL ASSESSMENTS, 4 to 7.

CHANCERY.**JURISDICTION.**

1. *Assignee of a contract—remedy at law.* A railroad company entered into a contract in writing, with a person, by the terms of which the latter was to manufacture for the company a certain number of cars. This contract was assigned by the party who was to manufacture the cars, to another, who furnished a part of the cars, and assigned his interest in the amount owing upon the contract to certain persons to whom he was indebted for materials, furnished for the construction of the cars. These creditors

* See also the case of *Lawrence v. Hagerman*, 56 Ill. 68.

CHANCERY. JURISDICTION. *Continued.*

thereupon instituted their suit in chancery against the railroad company, to enforce the payment of the money due under the contract, to them: *Held*, the complainants had no *status* in a court of equity. If there were any *bona fide* assignees of the contract, they could maintain a suit at law for their use. *Chicago & Northwestern Railway Co. v. Nichols et al.* 464.

2. *Where there is a defense at law.* Where a purchaser of land has an opportunity to defend a suit at law brought to recover the purchase money, on the ground that the contract of sale has been rescinded, but omits to interpose such defense, he will be deemed to have waived it, and can not, after permitting a judgment to be recovered against him, come into a court of chancery and set up the fact of such rescission as a ground for an injunction to restrain the collection of the judgment. *Jeune & Almini v. Osgood et al.* 340.

3. A party failing to make a defense at law, will not be permitted to come into equity and have the subject matter of such defense allowed, unless he can show he was prevented from making his defense at law by accident, fraud or mistake. *Ibid.* 340.

4. *At what stage of the proceedings the jurisdiction may be questioned.* See PRACTICE, 1.

EQUITY HAVING ACQUIRED JURISDICTION.

5. *Will retain the case.* Where a court of equity has obtained jurisdiction of the case, to remove a cloud upon the title occasioned by a sale of a homestead under execution, it will proceed to do complete justice, and in such case give rents against the purchaser under the execution, for the time the property was occupied by him. *Conklin et al. v. Foster*, 104.

TO ENFORCE A JUDGMENT AT LAW.

6. A vendor of land having recovered a judgment at law for a portion of the purchase money, the vendee sought, by bill in chancery, to enjoin the judgment, on the alleged ground that the contract had been rescinded. The vendor, by cross bill, set up his judgment, and asked a decree for its payment: *Held*, the mere fact that he held the judgment, although it was for purchase money, did not entitle him to relief in equity, such as that sought by the cross bill. *Jeune & Almini v. Osgood et al.* 340.

CROSS BILL.

7. *Whether germane to the subject matter of the original suit.* A party filed a petition to enforce a mechanic's lien, making, among others, a subsequent grantee of the fee in the premises, and a mortgagee, parties defendant. After the commencement of this proceeding the mortgagee, under a power contained in the mortgage, sold the premises to a third person, to whom a deed was made. Thereupon the owner in fee filed his cross bill, charging that the sale under the mortgage was in

CHANCERY. CROSS BILL. *Continued.*

fraud of his rights, and asking relief in respect thereto: *Held*, the subject matter of the cross bill was germane to that of the original suit, although it was something which did not affect the interest of the petitioner himself, in the suit. *Chicago Artesian Well Co. v. Connecticut Mutual Life Insurance Co. et al.* 424.

8. *Time for filing cross bill.* The cross bill in this case was not filed until after a final decree was entered in the original suit, declaring the rights of the parties in respect to their several liens, but as it did not propose to interfere in any way with the operation of that decree, nor tend to delay the petitioner in securing his rights under it, the cross bill was regarded as filed in sufficient time to be considered. In a case so circumstanced, it ought never to be too late to file such a cross bill, so long as the court has control of the case. *Ibid.* 424.

9. *Whether the cross bill should be retained after the original ground of suit is satisfied.* After the filing of the cross bill the claim of the original petitioner was paid, but it did not follow that the court had no power after that to determine questions between co-defendants. They were still before the court, not necessarily dismissed from it by such payment of the petitioner's decree, and the bill had not been dismissed. The cross bill in such case should be retained, for the purpose of settling the question presented by it, and it was erroneous to refuse a motion for a rule upon the defendant thereto to answer the same, at that stage of the proceedings. *Ibid.* 424.

FAILURE OF CONSIDERATION OF A DEED.

10. *When equity will decree a reconveyance of land given in consideration of marriage.* Where land is conveyed in consideration of a marriage contract, and the grantee refuses to consummate the marriage, equity will decree a reconveyance. Marriage is a valid consideration for a deed. *Rockafellow v. Newcomb*, 186.

RESCISSION OF CONTRACT FOR FRAUD.

11. *Laches.* Where a party seeks to rescind a contract for fraud, he must ask the aid of the court in a reasonable time. *Rogers v. Higgins et al.* 244.

JUDGMENT OBTAINED BY FRAUD.

12. *Remedy in chancery.* A court of chancery has power to annul and cancel a judgment at law if it has been obtained by fraud. *Ogden v. Larrabee, Admr.* 389.

13. Where a vendor of land sold the same to another, thereby declaring a forfeiture of the prior contract, and also putting it out of his power to convey according to its terms, and afterwards obtained an allowance against the estate of the purchaser under such prior contract, for the unpaid purchase money, it was *held*, the procurement of the allowance under such circumstances was fraudulent in law, and a court of chancery should set aside and cancel the same. *Ibid.* 389.

CHANCERY. *Continued.*

UNDUE INFLUENCE.

14. *Will avoid a deed.* Undue influence exercised by the grantee over the grantor to obtain a conveyance of real estate, resulting in a benefit to the former and a great disadvantage to the latter, will avoid the deed. As, where it was sought to obtain a reconveyance of land on the ground, as alleged by the complainant, that he executed the deed in consideration of a promise on the part of the defendant to marry him, which the latter refused to fulfill, it was *held*, that although the contract of marriage may not have formed the consideration for the deed, yet the proof showing that the grantee exercised an undue influence over the grantor in obtaining the deed, to the great benefit of the former and the great disadvantage of the latter, by reason of the close and tender intimacy between the parties, visits having been interchanged and loving letters passed between them, and the woman threatening to annul the marriage contract unless the trade was consummated, afforded sufficient grounds upon which to decree a reconveyance. *Rockafellow v. Newcomb*, 186.

MENTAL INCAPACITY TO CONTRACT.

15. *Whether ground for rescission.* Mental imbecility alone will not authorize a court of equity to set aside an executed contract, the mental weakness of the party not amounting to an incapacity to comprehend the contract, and there being no evidence of imposition or undue influence. *Rogers v. Higgins et al.* 244.

16. *Solicitation, importunity, argument and persuasion* to induce the party to enter into a contract, would not of themselves affect the validity of a deed. *Ibid.* 244.

SPECIFIC PERFORMANCE.

17. *When granted, and upon what terms.* Where a purchaser of land has made default in payment by reason of an incumbrance upon the land, which was to be conveyed free from any incumbrance, yet, after the vendor has declared a forfeiture, and recovered in ejectment, the vendee may, notwithstanding the incumbrance, tender the balance of the purchase money, waive his right to insist upon a perfect title, and compel a specific performance of the agreement. It would be inequitable to permit the vendor to retain the money paid, to get the land with valuable improvements placed thereon by the purchaser, and escape the payment of the taxes while occupied by the purchaser, and give the purchaser nothing but the use of the land. In such a case, it is equitable to decree that the purchaser pay the balance of the price agreed to be paid for the land, less the amount of the incumbrance, and to require the vendor to execute a deed with the covenants stipulated for in the agreement. *Wallace v. McLaughlin*, 53.

18. *Delay in payment.* A court of equity will enforce the specific performance of a contract for the sale of land, in favor of the purchaser, where time is not of its essence, although the money was not

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

paid within the time fixed by the agreement of the parties, if any reasonable excuse for such delay be shown. *Snyder et al. v. Spaulding*, 480.

19. *Delay in payment—incumbrance.* In a suit for the specific performance of a contract for the sale of land, on which no money had been paid, brought by the purchaser against the vendor, it was held, the purchaser could not be excused for the failure on his part to pay the purchase money when due, on the ground there was an apparent lien on the premises, for a sum of money in favor of a third person, having, before he claimed to have any knowledge of the existence of such lien, and after the purchase money was due, lost the right to ask a court of chancery for a decree of specific performance, by showing himself either unable or unwilling to perform his part of the contract. *Shortall v. Mitchell et al.* 161.*

20. Though, had the vendor brought suit against the purchaser, the apparent lien, upon the record, might be of some importance. *Ibid* 161.

21. *Conveyance of land will be granted only on the specific terms of the agreement.* See **PARTNERSHIP**, 8.

REMOVING CLOUD UPON TITLE.

22. *Improper amendment of sheriff's return.* Where a sheriff, who was interested in a cause, was improperly allowed, after his term of office expired, to amend the return upon the summons therein, so as to obviate an objection as to jurisdiction, and it appearing he was insolvent, a court of equity had jurisdiction, upon bill filed for that purpose, to relieve the defendant in the original proceeding from the effect of the amended return—the same, under such circumstances, being fraudulently made, and operating as a cloud upon his title, and there being no adequate remedy at law. *O'Conner et al. v. Wilson et al.* 226.

23. *Sale of homestead under execution.* Although a sale of the house, situated on leased ground, owned and occupied as a homestead, under an execution, confers no title, still, it being a cloud on the title, equity will take jurisdiction to remove the cloud, especially when the purchaser under the execution is in possession, and threatens to remove the house, and thus commit waste. *Conklin et al. v. Foster*, 104.

OF ALLOWANCE FOR IMPROVEMENTS.

24. *On setting aside the title of the party claiming them.* In a suit in chancery to set aside a sheriff's deed, a decree being rendered granting the relief sought, and an account of rents and profits taken against the

*As to the effect of an existing incumbrance on the right of the vendor to declare a forfeiture for failure to pay, see **VENDOR AND PURCHASER**, 1, 2.

CHANCERY. OF ALLOWANCE FOR IMPROVEMENTS. *Continued.*

defendant, upon objection that the court erred in not allowing the defendant for the improvements placed upon the land, it was *held*, the improvements having been made by a tenant of the defendant, the latter paying nothing therefor and incurring no liability on account of them, the charge was properly denied. The defendant was only entitled to allowance for the necessary improvements put upon the land, for which he had paid or was liable to pay. *Stout et al. v. Cook*, 386.

ACCOUNTS SHOULD BE REFERRED TO MASTER.

25. Questions arising out of matters of account, unless there has been a reference to a master to take and state the account, and the proper exceptions taken before him and in the court below, will not be considered by this court. *Hewitt et al. v. Dement et al.* 500.

NEW TRIAL AT LAW.

26. *When granted in chancery.* It is only in cases that commend themselves strongly to equitable relief, that a court of equity will interpose to vacate a judgment at law; and though the power of the chancellor to control the courts of general jurisdiction, to set aside, modify and otherwise interfere with judgments at law, is now conceded and fully established, yet it is upon fixed and determinate rules alone that the jurisdiction will be exercised. *Holmes v. Stater et al.* 209.

27. Judgments at law will not be vacated capriciously or as a mere matter of discretion, nor because the chancellor would, on the evidence heard in the suit at law, have arrived at a different conclusion from that reached by the jury. *Ibid.* 209.

28. Where a party has been brought into a court of law, and has had an opportunity of interposing a defense, and fails to do so, the repose of society requires that by the judgment then rendered the litigation should there end and the controversy terminate, unless, by accident, mistake or fraud, the party has been prevented from interposing his defense, establishing his claim. And even though the judgment is manifestly wrong in law and in fact, or when allowing it to stand will compel the payment of a debt the defendant does not owe, unless it appears it was obtained by fraud or was the result of accident or mistake, relief in equity will not be granted. *Ibid.* 209.

29. Where, however, a party, after making every effort in his power to discover evidence, fails, upon its being afterwards discovered, a court of equity will treat this as an accident, and will, when satisfied that such evidence would have produced a different result, and that the judgment thus obtained is unjust and should not be paid, grant a new trial; but all these requirements must concur before it will interpose its power to afford relief. It must appear that the judgment is manifestly wrong; that the evidence has come to the knowledge of the complainant after the trial; that he had exhausted all reasonable means

 CHANCERY. NEW TRIAL AT LAW. *Continued.*

and efforts to discover it before the trial, and that it would, without a reasonable doubt, when introduced on a new trial produce a different result—it is not enough that the newly discovered evidence only renders it probable that a different result would follow. *Holmes v. Stetler et al.* 209.

30. The newly discovered evidence, to be availing, must not be cumulative merely. *Ibid.* 209.

DECREE PRO CONFESSO.

31. *Upon insufficient allegations—whether void or voidable.* If a person is in court by due service, as party to a bill praying a sale of lands in payment of certain judgments, on the ground that the lands belonged to the judgment debtor, and the bill shows upon its face that such defendant claimed an interest which the complainant seeks to subject to sale because of its inferior equity, and was made a party that he might disclose his interest, but, neglecting to interpose any defense, a decree *pro confesso* is entered against him, such decree, however erroneous because the allegations in the bill as to the title of the defendant were not positive or specific, or because the bill failed to show the complainant did not have an adequate remedy at law, is not void, and a sale under its authority is not a nullity. *Thomson v. Morris et al.* 333.

32. In such case, when the decree is collaterally assailed, it is sufficient to know that the defendants were in court by service or appearance, that the decree was one which a court of equity has power to make, and that the subject matter upon which it operated was brought by the bill before the court for adjudication. *Ibid.* 333.

33. So, upon bill filed by a judgment creditor, to subject certain lands to sale for the satisfaction of the judgment, a third person, who had purchased a portion of the lands under another judgment against the same debtor, was made a party defendant. The only distinct allegation in the bill affecting the title of that defendant was, that at the time the complainant obtained his judgment, and at the close of the term when it was rendered, the judgment debtor owned the lands. The bill, however, charged that the defendant claimed some right or title to a part of the lands, in some way through the judgment debtor, and that he knew of complainant's superior equity in the lands when he acquired his interest therein, and asked that he might set forth what title or claim he had. The defendant was duly served with process, but, failing to make any defense, a decree *pro confesso* was entered and the lands sold thereunder. Upon bill subsequently filed by such defendant, to set aside the title thus acquired, as a cloud upon his title, upon the alleged ground that as there was no specific allegation in the bill in the former suit to the effect that the title claimed by him was for any reason subject to that judgment, the default admitted nothing to his prejudice, and the decree was void for the reason his title was

CHANCERY. DECREE PRO CONFESSO. *Continued.*

not before the court for adjudication, it was *held*, that however erroneous that decree may have been for want of sufficient allegations in the bill, it was not void. The bill brought the question of the sale of the lands before the court for adjudication, and the subject was one of ordinary chancery cognizance,—so there was no want of jurisdiction in the court over the subject matter. *Thomson v. Morris et al.* 833.

AMENDMENT OF THE BILL.

When allowable. See AMENDMENTS, 9, 10.

GAMING CONTRACTS.

Remedy in chancery to compel the surrender of a draft paid in a gaming transaction. See GAMING CONTRACTS, 2.

REFORMING AN INSTRUMENT.

Mistake in a chattel mortgage in the description of the premises where the property is situate. See MISTAKE, 1.

ALLOWANCE IN LIEU OF DOWER.

Under section 28 of the dower act—whether a court of equity can change it. See DOWER, 4.

CHATTEL MORTGAGES.**PROPERTY SUBJECT TO EXECUTION.**

Against mortgagor. See EXECUTION, 2.

CLOUD UPON TITLE. See CHANCERY, 22, 23.**CONFESSION OF JUDGMENT.****UPON A JOINT AND SEVERAL NOTE.**

1. A joint and several promissory note was executed by seven persons, and made payable on the order of two of the makers, by whom it was indorsed to a third person. Under a warrant of attorney to confess a judgment upon such note, according to its tenor and effect, it was *held*, that the power was substantially pursued in the confession of a judgment against five of the makers jointly, excluding the two on whose order the note was made payable. *Knox et al. v. The Winsted Savings Bank*, 330.

VACATING THE JUDGMENT.

2. *Ground therefor.* On a motion to vacate a judgment entered by confession, the question is not whether the judgment shall be vacated for error of law, but whether there exists any equitable reasons for opening the judgment. *Ibid.* 330.

3. And the fact that the judgment was confessed against several of the makers of the note jointly, but not against all, did not afford any equitable reason for vacating the judgment.

CONSIDERATION.

WANT OF CONSIDERATION.

1. *Of a new note payable in a more valuable medium.* Where the maker of a promissory note, which is payable in United States treasury notes, not being able to meet the same at maturity, gives another note to his creditor, payable in gold; in order to secure the latter against any loss by reason of the depreciation of treasury notes after the maturity of the original note, and before its payment, the second note given for such purpose will be without consideration. *Gates et al. v. Hackethal*, 584.

2. *Agreement for an extension of time.* If a debtor gives his note for an additional sum, upon an agreement for an extension of time for the payment of the original indebtedness, but the agreement specifies no time for such payment, so that it may still be enforced presently, there will be no consideration for the new note. *Ibid.* 584.

ADEQUACY OF CONSIDERATION.

3. *How determined.* Where a party purchased a lot of ground in the adverse possession of another, upon the question whether the price paid was grossly inadequate, it was *held*, the adequacy of consideration should be measured, not by the value of the lot, but by its value after deducting the cost of its recovery. *Rogers v. Higgins et al.* 244.

FAILURE OF CONSIDERATION OF A DEED.

Equity will decree a reconveyance. See CHANCERY, 10.

CONSOLIDATING CAUSES OF ACTION.

BEFORE JUSTICES OF THE PEACE. See JUSTICES OF THE PEACE, 1, 2, 3.

CONSOLIDATED SUITS.

OF A SINGLE VERDICT FOR ALL. See VERDICT, 1.

CONSTITUTIONAL LAW.

TAXATION UPON MUNICIPAL CORPORATIONS.

1. *The act of April 16, 1869*, making it the duty of the Auditor of Public Accounts to ascertain the amount of interest that will accrue on town and other bonds registered in his office, and certify the amount to the county clerk, to be by him extended on the collector's books, and collected in the manner State revenue is collected, is not violative of sec. 5, art. 9, of the constitution of 1848. The last clause of that section vests the legislature with the power to require all property of individuals in the corporate limits, to be taxed for the payment of debts contracted under authority of law. The first clause is a limitation on the power of the general assembly to levy a tax or create a corporate debt, or to authorize others to do so, but the latter clause is imperative, that the general assembly shall require all property within the corporation to be taxed for payment of corporate debts that have been created,

CONSTITUTIONAL LAW.

TAXATION UPON MUNICIPAL CORPORATIONS. *Continued.*

and operates as an express authority to impose taxes to pay such debts, nor does it limit their power in the choice of the instruments for the purpose. *Dunnovan et al. v. Green*, 63.

2. That section does not provide that the legislature shall require such tax to be levied through the corporate authorities, but they may select the agents to levy and collect the tax for the payment of the debt. There is a broad distinction between the two clauses; the first only authorizes that body to confer power to levy taxes for corporate purposes, and to create a corporate debt; but the last clause fully empowers the legislature to cause taxes to be collected for the payment of corporate indebtedness when created. This provision of the law is not unconstitutional. *Ibid.* 63.

OF LENDING THE CREDIT OF THE STATE.

3. *In its application to local taxation to pay interest on bonds of municipal corporations—act of 1869.* The 38th sec. of art. 13 of the constitution of 1848, which prohibits the State from giving its credit to or in aid of any individual, or association or corporation, is not violated by levying and collecting such a tax as this. It is not declared to be a State tax; the Auditor's certificate shows it to be a local tax, and for municipal purposes. The tax is levied on property in the township, and no portion is taken from the State revenue, general or special, to aid the railroad company, or to pay the debts of the township. It is not, directly or indirectly, giving the credit of the State in aid of this or any other road, individual or corporation. The fact that it was levied by the Auditor, extended in the column of the State taxes by the county clerk in the collector's books, was mere form, and in nowise changed its nature; and it, when collected, is kept as a separate fund, and applied to the local purpose for which it was collected. Hence, the levy of this tax did not violate the latter provision of the constitution.

AID TO RAILROADS BY MUNICIPAL CORPORATIONS.

4. *Effect of the new constitution of 1870 upon existing laws on that subject.* See CORPORATIONS, 6.

CORPORATE OR LOCAL TAXATION.

5. *Constitutional restriction of legislative power—and herein, who are "corporate authorities."* See TAXATION, 6, 7, 8.

CONTINUANCE.

ASSESSMENT OF DAMAGES.

On dissolution of injunction—of a continuance thereon. See INJUNCTIONS, 11.

CONTRACTS.

PARTIES MUST AGREE.

1. The minds of the parties must come together on the terms and conditions of an agreement before there can be a contract. *Davidson v. Porter et al.* 300.

DURESS OF PROPERTY.

2. *Whether it will avoid a contract.* Where goods, requiring special care, and of a perishable nature, were wrongfully taken and kept from the owner thereof by means of a writ of attachment fraudulently obtained, and were rapidly going to destruction, and the party in possession refused to surrender the goods on payment of the sum actually due, demanding more than twice that amount, and, in addition thereto, a release from all damages for his wrongful acts, and the defendant in the attachment, to obtain possession of his property, paid the sum demanded and executed the release, it was *held*, in an action on the case for wrongfully suing out the attachment, a release executed under such circumstances could be avoided on the ground of duress. *Spaids v. Barrett et al.* 289.

CONTRACT NOT REDUCED TO WRITING.

3. *As was agreed—effect of one of the parties acting under it.* Where parties agree upon the terms of a contract which is to be reduced to writing, but never was, and the parties on one side avail themselves of the benefits of the proposition, and go on under this agreement as though it had been in writing, the parties acting under it, and receiving all the benefits of the agreement, can not be heard to say that it was understood between them that the contract was not to be binding unless reduced to writing. Having availed themselves of all the benefits of the contract, they must be bound by its provisions. *Miller et al. v. McManis*, 126.

RESCISSION OF CONTRACTS.

4. *What constitutes—declaration of forfeiture.* The sale of land to a third person by the vendor, during the existence of a prior contract of sale, will operate as a rescission of such prior contract, and that fact of itself will amount to a declaration of forfeiture thereof. *Ogden v. Larrabee, Admr.* 389.

5. *By a vendor—for default in payment.* In a suit instituted by a purchaser of land to enforce a specific performance, it appeared that in May, 1864, the complainant proposed to purchase the premises at a stated price, a portion to be paid down, and the balance in one and two years. On the 12th of that month his offer was accepted and the contract closed,—the cash payment made, and the purchaser took possession. On the 16th or 17th of June following, the vendor proposed to accept, in satisfaction of the contract, a less sum than the amount of the deferred payments if paid within thirty days, to which the purchaser assented. On the 17th of June, a suit was instituted in the

CONTRACTS. RESCISSION OF CONTRACTS. *Continued.*

county in which the land was situated, against the vendor as surety on the official bond of the treasurer of the trustees of schools in a certain township therein. Within the thirty days the purchaser tendered the amount to be paid within that time, and demanded a deed, but demanded that the vendor should first remove the lien he was advised was created by the suit on the treasurer's bond. This the vendor declined to do. In August following, the vendor tendered a deed and demanded the balance of the purchase money, but the purchaser refused to pay the money until the supposed lien was removed. Soon after, the vendor attempted to rescind the contract by a sale to other parties: *Held*, the vendor did not, under the circumstances, have a right to rescind the contract on account of delay in payment. The purchaser was not bound to determine whether the issuing of the summons in the suit on the treasurer's bond, operated to create a lien to his injury. It was sufficient in such case, to justify the delay in payment, that the facts cast a cloud upon the title and rendered it suspicious in the minds of reasonable men, and, to some considerable extent, affected its value. *Snyder et al. v. Spaulding*, 480.

6. *Placing purchaser in statu quo.* Under the circumstances mentioned, the vendor would have no right to rescind the contract, even though the purchaser did not make payment within the time agreed upon, without first returning to him the money he had paid, or offering to do so. The vendor was in fault in not removing the cloud upon the title. *Ibid.* 480.

7. If there be mutual fault, the party who seeks to avail of the right to rescind must place the other party *in statu quo*. Or, if there be fault on the part of one party, and the other party refuses to perform the contract for that reason, the former, before he can rescind the contract for non-performance, must restore whatever consideration he has received. *Ibid.* 480.

RESCISSION OF WRITTEN CONTRACT BY PAROL.

8. *As between vendor and purchaser—statute of frauds.* Where the parties to a written contract for the sale of land agree by parol to rescind the same, one of the conditions of such agreement being that the vendee shall return to the vendor the written contract to convey, it is *held*, that although the vendee perform all the other conditions, if he refuse to surrender the written contract he thereby keeps it alive, and refusing to release the vendor from his obligation to convey, he continues his own liability to pay the purchase money. *Jeans & Almini v. Osgood et al.*, 340.

9. The verbal agreement to cancel could be set up as a defense to a bill by the vendor, to compel a surrender of the written contract, as being within the statute of frauds. He is not required, in such case, to

CONTRACTS. RESCISSION OF WRITTEN CONTRACT BY PAROL. *Continued.*

abandon his claim for the purchase money and run the risk of having to perform his agreement to convey. *Jeane & Almini v. Osgood et al.* 340.

10. And even though the vendor could, under the terms of the written contract, declare a forfeiture on account of default on the part of the vendee, and thus terminate his own liability, he would not be bound to do so under such circumstances, but might still hold the vendee liable. *Ibid.* 340.

FAILURE OF CONSIDERATION OF A DEED.

Whether equity will decree a reconveyance. See **CHANCERY**, 10.

UNDUE INFLUENCE.

Will avoid a deed, and equity will decree a reconveyance. Same title, 14.

MENTAL INCAPACITY.

Whether sufficient to authorize a rescission in equity. See same title, 15.

IMPORTUNITY AND PERSUASION.

Whether validity of deed affected thereby. Same title, 16.

CONVEYANCES.

DESCRIPTION OF THE PREMISES. See **DESCRIPTION**.

COOK COUNTY DRAINAGE COMMISSIONERS.**CAN NOT LEVY TAXES.**

Being a mere private corporation. See **TAXATION**, 7, 8.

CORPORATE AUTHORITIES.**WHO REGARDED AS SUCH.**

In respect to taxation. See **TAXATION**, 6, 7, 8.

CORPORATIONS.**COMBINATION AMONG STOCKHOLDERS.**

1. *To control the corporation.* Three persons, owning a majority of the stock of an incorporated company organized for the purpose of mining coal upon their lands, and having leased the premises, formed a partnership for the prosecution of the business, entered into an agreement, as between themselves, that they would elect the directors of the company; that they would determine among themselves as to its officers and management, and that if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election: *Held*, this agreement was not void, as against public policy; the persons owning a majority of the stock had a right to combine, and thus secure the board of directors and the management of the property. *Fluidds v. Yates et al.* 416.

CORPORATIONS. *Continued.*

ELECTION OF DIRECTORS.

2. Where a corporation is organized under the general law of 1859, a certificate signed by persons, in compliance with the statute, with the proper certificate of the county clerk appended as required by law, is evidence of the election of directors. *Skinner et al. v. Lake View Avenue Co.* 151.

OF PRIVATE CORPORATIONS.

3. *As distinguished from those "corporate authorities" who may be invested with the power of taxation.* See TAXATION, 8.

MUNICIPAL CORPORATIONS.

4. *Of the limit of their powers.* A corporation must show a grant, either in terms or by necessary implication, for all the powers it attempts to exercise, and especially so when it claims the right, by taxing or otherwise, to divest individuals of their property without their consent. *Mix v. Ross et al.* 121.

5. *Of a new power, given by statute—of the manner of its exercise.* When a statute gives a new power and also provides the means of executing it, those claiming the power can execute it in no other manner, and where power to make assessments is given, their payment can only be enforced in the method prescribed by the statute. *Ibid.* 121.

6. *Subscription or donation to capital stock of railway companies—effect of the new constitution of 1870.* Upon an application for a writ of mandamus, made in January, 1870, to compel the supervisor of a town to call an election, under the provisions of "an act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869, to decide whether the township would subscribe for or donate to the capital stock of a certain railway company, it was held, even if the relator had a right to the writ, it could not be executed since the adoption of the new constitution. *The People ex rel. Breckenridge v. Brooks*, 142.

7. *Of their subscription in aid of railroads, and taxation to pay interest upon bonds issued therefor.* See TAXATION, 9, 10; CONSTITUTIONAL LAW, 1, 2.

8. *Of the control of cities over the grade of their streets—and of their liability to individuals in respect thereto.* See HIGHWAYS, 4 to 7.

9. *Liability of towns for neglect to keep highways in repair.* Same title, 9.

10. *Power of cities to abolish sidewalks—rights of adjacent owners.* Same title, 8.

COSTS.

COSTS IN CHANCERY.

1. *Against whom should be adjudged.* Where a complainant in chancery filed an amendment to his bill, for the purpose of correcting a mistake in the sheriff's deed under which he claimed title to the land in controversy, and the defendant filed a cross bill, the prayer of which was granted, but the court decreed to the complainant in the original bill partial relief, it was *held* erroneous to adjudge against the complainant in the cross bill the costs thereof, the same being necessary to the procurement of the relief obtained by it; and that the costs of the amendment to the original bill, although the relief sought by it was granted, should have been adjudged against the complainant therein, the error which it sought to correct not having been occasioned by the defendant, and he not resisting the correction in a way to make him chargeable with the costs. *Linton et al. v. Quimby*, 271.

2. *Solicitor's fees.* The payee of a draft having lost a certain sum at gaming, indorsed the same and delivered it to the winner, and afterwards filed a bill in chancery, in which the first indorsee, the drawer, and the holder of the draft, were made parties defendant, to enjoin its payment by the drawer to the holder, the drawee having refused to pay it, and to have his indorsement cancelled and the draft delivered up to him, upon a cross bill filed by the drawer, averring his readiness at all times to pay the draft to the lawful owner, and offering to pay the amount into court, with prayer that the different claimants interplead and settle the ownership of the draft, it was *held*, a decree allowing the complainant in the cross bill \$100 for solicitor's fees was erroneous. Only his costs should have been allowed. *Chapin et al. v. Dake*, 295.

3. In such case the costs of the original, but not of the cross bill, would be properly adjudged against the first indorsee. *Ibid.* 295.

OF ABSTRACTS, IN THE SUPREME COURT.

4. In this case the appellants printed the entire testimony, which was very voluminous, and not being in compliance with the rule in respect to abstracts, the costs of the so-called abstract were taxed against the appellants, although the judgment was reversed. *Murray et al. v. McLean*, *Adm.* 378.

CREDIT OF THE STATE.

OF GIVING THE SAME.

In aid of corporations. See CONSTITUTIONAL LAW, 3.

CRIMINAL LAW.

FALSELY ASSUMING TO BE AN OFFICER.

1. *Police officer in Chicago—falsely assuming so to be.* Upon the trial of a party charged in the indictment with a violation of a section of

CRIMINAL LAW. FALSELY ASSUMING TO BE AN OFFICER. *Continued.*

the charter of the city of Chicago, in representing himself to be a member of the police force of said city, with a fraudulent design, it appeared the defendant was deputed by a justice of the peace to serve a *capias*, and upon arresting the party against whom the writ was issued, in answer to her demand for his authority replied, "I am a police officer": *Held*, under the circumstances, the writ being issued and executed in the city, the jury were justified in the inference that the answer was designed and understood to be a representation that he was a police officer "of the city of Chicago." *Lansing v. The People*, 241.

CROSS BILL. See **CHANCERY**, 7, 8, 9.

CUSTOM.

WHETHER BINDING. See **RAILROADS**, 2.

DAMAGES.

MEASURE OF DAMAGES. See **MEASURE OF DAMAGES**.

EXEMPLARY DAMAGES. Same title, 6, 7.

EXCESSIVE DAMAGES. See **NEW TRIALS**, 5, 6.

DECREE.**CONSTRUCTION OF A DECREE.**

1. Where a contractor to build a school house for a certain school district, sold the orders upon the treasurer given him under the contract, the holders of such orders, in a suit in chancery, obtained a decree which directed the treasurer to pay the sum due for building the school house, or so much or such part of that sum as might not be otherwise appropriated so in his hands, and the balance of the sum out of any funds in his hands, or that might come to his hands, belonging to the district, not otherwise appropriated: *Held*, the treasurer would not be in contempt, under this decree, in refusing to pay to complainants all money expressly appropriated by law, and in refusing to pay, under the decree, funds obtained for the support and to defray the expense of schools. *Pennington et al. v. Coe et al.* 118.

DECREE PRO CONFESSO.

Upon insufficient allegations—whether void or voidable. See **CHANCERY**, 31, 32, 33.

SERVICE OF PROCESS.

Where the decree finds there was service, and where it omits to do so. See **PROCESS**, 2, 3, 4.

DEDICATION.

FOR A HIGHWAY.

1. *Effect of a plat.* Where a tract of land of such character as not to be regarded as *urban* property, was laid out into lots of ten acres each, by the owner, who so platted the ground as to indicate that a certain strip was designed for use as a highway, but the plat was not in conformity with the statute, it was *held*, a dedication would not result from the mere making and recording of such a plat, but it would amount to nothing more than evidence tending to show a dedication, as at common law. *Trustees of the First Evangel. Church et al. v. Walsh et al.* 363.

ESTOPPEL IN PAIS.

2. And while the doctrine of estoppel *in pais* is not to be regarded as foreign to the principle upon which dedication rests, yet, where it did not appear that any of the lots had been sold with reference to the plat, which was of no statutory force of itself, or any improvements made with a view thereto, or any acceptance of the supposed highway by the public, there could be no estoppel to preclude the owner from denying there was a dedication. *Ibid.* 363. ✓

3. When a dedication is relied upon to establish the right, the acts of both the donor and the public authorities should be unequivocal and satisfactory, of the design to dedicate, on the one part, and to accept and appropriate to public use, on the other. *Ibid.* 363.

DEFAULT.

SETTING ASIDE DEFAULTS.

1. *The rule on that subject.* The long and well settled practice in this State, has been liberal in setting aside defaults at the term at which they were entered, when it appears that justice will be promoted thereby. The practice has not been so rigid as to require the party moving to set the default aside, to bring himself within the strict rules which govern applications in equity for new trials at law. *Mason v. McNamara et al.* 274.

2. But when it appears by the affidavit filed in support of the motion, that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default, if a reasonable excuse is shown for not having made the defense. *Ibid.* 274.

3. Though it has also been the practice to impose reasonable terms upon the defendant as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs, or that he comply with such other reasonable terms as may be imposed. *Ibid.* 274.

4. In such cases the object is that justice be done between the parties, and not permit one party to obtain and retain an unjust advantage. *Ibid.* 274.

DEFAULT. SETTING ASIDE DEFAULTS. Continued.

5. *Judgment of the court refusing a motion to set aside a default, reversed in a given case.* On motion in the circuit court to set aside a default, at the term at which it was entered, based on the affidavit of the defendant, it appeared that he had a good and substantial defense to the suit upon the merits, and that he immediately, on being served with the summons, employed counsel to make that defense, and on the affidavit of the attorney, in substance, that he immediately, upon being retained, made efforts to find the declaration and continued his efforts for the purpose till the default was entered, repeatedly examining and inquiring in the proper office and of the proper person for the papers, being unable to procure them, and that he would have made a defense had he been able to find the declaration in time,—it being also manifest, from the affidavits, if they were true, that the papers were wrongfully, if not surreptitiously taken from their proper place of deposit, and under such circumstances as induced the belief that it was done for the purpose of preventing a defense and of obtaining the default: *Held*, the case thus presented was such as entitled the defendant to have the default set aside, and as called upon this court to reverse the judgment overruling the motion. *Mason v. McNamara et al.* 274.

DEMAND.

IN AN ACTION OF TROVER.

Demand of an agent. See TROVER, 4.

DESCENTS.**POSTHUMOUS HEIR.**

1. The true construction of our Statute of Descents, is, that a posthumous child inherits of an intestate father precisely as do his children born in his life time. On the death of a father, the title to his real estate vests in the posthumous child, although *in ventre sa mere*, precisely as though such child had been previously born. *Botsford v. O'Connor et al.* 72.

DESCRIPTION.**DESCRIPTION OF PREMISES.**

1. *In a sheriff's deed.* The description of the premises ordered to be sold by a judgment of foreclosure by *scire facias*, and the execution issued thereon, was lot 2, block 51, in school section addition to Chicago. The lot was levied on as thus described, and is the same in the sheriff's deed, with these additional words, "except 59 feet off the west end" sold to McGraw, of which he was then in the occupancy: *Held*, that even if this exception was uncertain and void, still that is no ground for setting aside the sale, as it is a matter by which McGraw or his grantee alone could be affected. *Winchell et al. v. Edwards et al.* 41.

DESCRIPTION. DESCRIPTION OF PREMISES. *Continued.*

2. *In an officer's return on an execution—whether sufficient.* See PROCESS, 9.

DISCRETIONARY.

MOTION TO SET ASIDE DEFAULT.

1. *How far matter of discretion—may be reviewed on error.* See PRACTICE IN THE SUPREME COURT, 3, 4.

TRIAL BY JURY.

2. *On assessment of damages upon dissolution of an injunction.* See JURY, 1.

DOWER.

OF A DEED IN FRAUD OF CREDITORS.

1. *Effect thereof on the dower right.* Where a deed from husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, or from any previous lien or incumbrance, or where the purchase money is recovered back for a defect of title in the husband, or by reason of any wrongful act on the part of the husband, the wife's dower in the land is not barred by the deed. *Morton et al. v. Noble*, 176.

WHERE THE ESTATE IS LOST BY NEGLIGENCE OF GRANTEE.

2. But where the husband and wife convey a perfect and indefeasible title, which is subsequently lost, solely by the fault and neglect of the grantee, the dower of the wife of the grantor in the land is not thereby restored. *Ibid.* 176.
3. As, where a party being seized in fee simple of certain land, he and his wife duly made, executed, and both acknowledged in due form of law, a deed conveying the title in fee simple to another, which deed was delivered but was not recorded until nearly a year thereafter, and subsequent to the execution of the deed and before it was recorded, a subsequent creditor of the grantor, there being no creditors at the date of the conveyance, obtained a judgment against him, which became a lien on the land and the premises were sold under an execution issued on such judgment, the grantee in the deed failing to redeem from the sale but allowing the title to mature in the purchaser, it was held not essential to pass the right of dower that the deed should be recorded, and the title never having failed or been defeated by reason of any prior lien or incumbrance, or any act on the part of the grantor, but solely by the *laches* of the grantee in failing to record the deed, the right of dower in the wife of the grantor was forever barred. *Ibid.* 176.

ALLOWANCE IN LIEU OF DOWER.

4. *Under sec. 28, of dower act—whether equity has jurisdiction to change it.* Where a widow has petitioned to recover dower, and by reason of the indivisibility of the property an allowance has been made

DOWER. ALLOWANCE IN LIEU OF DOWER. Continued.

to her, under the 28th section of the chapter on Dower, in lieu of dower, the sum so fixed can not afterwards be changed by a court of equity by reason of the property subsequently becoming greatly enhanced or depreciated in value. *Donoghue v. City of Chicago*, 235.

DURESS.

WHAT WILL AVOID A CONTRACT. See **CONTRACTS**, 2.

EJECTMENT.**LETTING IN THIRD PERSONS TO DEFEND.**

1. In an action of ejectment, after judgment rendered against the defendant in possession, upon motion based on affidavit at a subsequent term other parties were permitted to defend: *Held*, the affidavit, it appearing from the statements therein that the title claimed by the applicants was consistent with the possession, and that there was a privity of interest between them and the original defendant, was sufficient to justify the action of the court in vacating the judgment and permitting the applicants to defend—it was not necessary that an exhibit of their title should accompany the affidavit. *Stribling et al. v. Prettyman*, 871.

ELECTIONS.**OF ELECTIONS FOR SCHOOL PURPOSES.**

1. *Election to borrow money—effect of negative result on prior election to build a school house.* Where the people of a school district vote to build a school house and locate the same, subsequent elections for borrowing money therefor, resulting in the negative, do not affect the validity of the result of the first election. The people may have been willing to be taxed for building a school house, and not willing to borrow money and pay ten per cent interest for the purpose. *Pennington et al. v. Coe et al.* 118.

REGISTRY OF VOTERS.

2. *Whether necessary.* At an election in a township for and against subscribing stock to a railroad company, under the charter, which does not require a registry of the voters, the registry law of 1885 does not apply, the presumption being that this should be held like other township elections. But if a registry was required, the court does not hold that its omission would avoid bonds in the hands of innocent holders. *Dunnovan et al. v. Green*, 63.

WHAT MAJORITY REQUIRED.

3. Where the charter authorizing the election provides that when a majority of the votes shall be for subscription, it shall be made, it refers to a majority of the votes cast, and not a majority of the voters residing in the township. *Ibid.* 63.

ERROR.

WHAT IS SUBJECT TO REVIEW ON ERROR.

Refusal to set aside a default. See **PRACTICE IN THE SUPREME COURT**, 3, 4.

ERROR WILL NOT ALWAYS REVERSE. See **PRACTICE IN THE SUPREME COURT**, 1, 2.

ESTOPPEL.

BY ADMISSIONS.

1. *As to genuineness of a note.* In a suit upon a promissory note, in which the pleadings required proof of the execution of the note, where there was no such proof made, but an admission by the defendant of the genuineness of a note not identified as the note in controversy, and where the evidence strongly tended to support the defense that the note was obtained by fraud and circumvention: *Held*, that it was error to instruct the jury that defendant was estopped to deny the execution of the note, and that the jury should not consider any evidence to that effect, in making their verdict. *Glazier v. Streamer*, 91.

2. The admission in open court, by the defendant in ejectment, that the plaintiff had title at the time of the commencement of the suit, operates as an estoppel, and it is the province of the court so to direct the jury. *Stribling et al. v. Prettyman*, 371.

ESTOPPEL IN PARS.

3. *And herein of the principles governing the same.* If a party make a declaration, or do any act to induce another to do an act that he would not otherwise do, or to invest his capital on the faith of such declaration or act, he will be estopped to deny the truth of his declaration, or the just effect of his act. *Hafner v. Vandolah*, 520.

4. When a party is interrogated concerning a transaction which affects the interests of another, if he remains silent, or answers falsely, and if the other is misled thereby, such party will be held bound by his silence or his false declarations. *Ibid.* 520.

5. When a party is induced, by the acts or the declarations of another, to do an act he would not otherwise have done, or omits to do an act he would have done but for the conduct of such party, and injury results therefrom, the party who induced such action, or non-action, must be held responsible for the consequences. *Ibid.* 520.

6. The doctrine of estoppels *in pars* is to prevent injuries arising from acts or declarations which have been acted on in good faith, and which it would be inequitable to permit the party to retract. In order to create such an estoppel, the party estopped must have induced the other party to occupy a position that he would not have occupied but for such acts and declarations. *Ibid.* 520.

ESTOPPEL. ESTOPPEL IN PAIS. *Continued.*

7. The conduct and representations must be such as would ordinarily lead to the results complained of. An act or declaration consistent with good faith, the injurious result of which could not have been foreseen or anticipated by any ordinary forecast of mind, would not operate as an estoppel, although injury may result therefrom to a third party. *Hefner v. Vandolah*, 520

8. But where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on the belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. *Ibid.* 520.

9. This doctrine of estoppel concerns conscience and equity, and the party that would avail of it must, himself, have acted in good faith towards the party on whose conduct he relied, or it will not be held to constitute a bar to the assertion of the truth. *Ibid.* 520.

10. When a party assists another in the sale of property, the legal title to which is in the seller, and recommends the title as being good in the vendor, such party thus assisting the sale will not be permitted to set up a secret equitable title in himself against such purchaser thus induced to buy and pay for the property. *Winchell et al. v. Edwards et al.* 41.

AS APPLIED TO A DEDICATION. See DEDICATION, 2.

EVIDENCE.**PAROL EVIDENCE.**

1. *To vary the terms of a power of attorney.* Where an agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and parol evidence is not admissible to vary or contradict it. *Sturges et al. v. Keith*, 451.

2. *In respect to indebtedness secured by mortgage.* Where a mortgage showed that it was given to secure a certain promissory note described therein, and also the sum of \$500, of other indebtedness, the \$500 not being evidenced by any note or bond outside of the mortgage itself, it was competent, upon a bill to foreclose, to show by parol evidence the nature and character of such indebtedness, and when contracted. That was in no sense enlarging the terms of the mortgage, but was simply showing the true amount of the consideration of the deed, and parol evidence is admissible for such purpose. *Babcock et al. v. Lisk*, 327.

3. *To establish identity of property embraced in a chattel mortgage.* Where personal property is correctly described in a chattel mortgage, but the lot of ground upon which it is situated is misdescribed, parol evidence is admissible to establish the identity of the property, and in

EVIDENCE. PAROL EVIDENCE. *Continued.*

this the law affords a full and complete remedy, and it must be sought on the common law side of the court. *Spaulding et al. v. Mosier et al.* 148.

4. *To prove usury.* In regard to transactions alleged to be usurious, parol evidence is admissible, in equity, to vary or contradict written contracts, for the purpose of showing their real character, and it has been held admissible to show by parol that a contract in the form of an absolute sale, was but a security for an usurious loan. *Hewitt et al. v. Dement et al.* 500.

5. *To aid defective service of process, or publication of notice.* See PROCESS, 5.

6. *To enlarge the powers of an agent, whose appointment is in writing.* See AGENCY, 4.

ADMISSIONS.

7. Admissions of a party are never conclusive against him; and when made for the purpose of effecting a compromise of the matter in dispute, should be excluded as evidence, on the ground of public policy. *Rockafellow v. Newcomb*, 186.

8. *As to execution of a promissory note, whether availing to estop the party from denying that fact.* See ESTOPPEL, 1.

DECLARATIONS OF A PARTY.

9. *Whether admissible in his favor.* In an action of replevin to recover a lot of cattle taken on execution, there was evidence tending to show the cattle were owned jointly by the plaintiff, and the defendant in the execution: *Held*, that declarations of the plaintiff, out of court, not under oath, and in the absence of the defendant in the execution, were inadmissible as evidence to enable the plaintiff to make out title in himself to the property in dispute. *Gray et al. v. Morey*, 221.

DECLARATIONS OF THIRD PERSONS.

10. In an action against a railroad company to recover for injuries to the plaintiff, occasioned by his falling through an uncovered bridge in attempting to get on the defendants' train, the bridge being under the control of the defendants, it was *held*, that declarations of the conductor of the train, made after the accident had happened, tending to show that the company had been guilty of negligence, were inadmissible as evidence. The danger of the bridge and the responsibility of the company as connected therewith, were to be determined by the jury from the evidence. The conductor was a competent witness, and whatever knowledge he had as to the condition of the bridge at the time, should have been stated by himself as a witness. *Chicago & Northwestern Railway Co. v. Fillmore*, 265.

EVIDENCE. *Continued.***OF CONJECTURES AND SUPPOSITIONS.**

11. Where a witness in his deposition testifies to mere conjectures and suppositions, it is error to admit such evidence to the jury when objected to by the opposite party. *Menifee v. Higgins*, 50.

OF PRIVATE CONVERSATIONS.

12. *And herein, of a motion to exclude evidence.* A party to whom a package, purporting to contain money, had been sent by express, upon calling for it at the place of destination, found it open and containing nothing but pieces of paper of no value. In a suit against the company to recover for the alleged loss, the agent who gave the package to the plaintiff, gave his testimony by deposition, and among the interrogatories in the commission, was this: "State what occurred, fully and in detail, at the time the plaintiff called for the package." The witness stated, in his answer, a conversation between himself and an assistant superintendent of the company, had out of the presence of the plaintiff, in which the witness spoke unfavorably of the claim of the plaintiff, and also suggested that the package had been opened by his predecessor in the office. On motion of the defendant to exclude from the jury all such portions of the answer as were irrelevant and improper, the court should have excluded all of the private conversation between the two agents of the company, as well that portion unfavorable to the plaintiff, as that adverse to the interests of the defendant, all that part of the answer being incompetent. *American Merchants' Union Express Co. v. Gilbert*, 468.

13. This private conversation between the agents was not responsive to the question, and though it was given under the interrogatory of the defendant, it was not chargeable to any agency of its own, and therefore the defendant was not precluded from asking its exclusion. *Ibid.* 468.

OF AN ATTORNEY'S MINUTES.

14. *What use may be made of them.* Although an attorney's minutes are not competent to supply the place of a lost deposition, and the witness being alive, it is not admissible to prove by others what he testified to in his deposition, it does not follow, because the attorney's notes are not admissible as evidence, that exhibits referred to in his notes would not be competent evidence on a subsequent trial, or that the attorney could not testify to the contents of lost exhibits, or refer to his notes for the purpose of refreshing his memory as in any other case. *Stout et al. v. Cook*, 386.

DESTRUCTION OF EVIDENCE BY A PARTY.

15. *Presumption.* Where a party is proved to have suppressed any species of evidence, or to have destroyed or defaced any written instrument, a presumption arises that, had the truth appeared, it would have

EVIDENCE. DESTRUCTION OF EVIDENCE BY A PARTY. *Continued.*

been against his interest, and the fabrication of evidence raises a presumption against the party doing so, no less than when evidence has been suppressed or withheld. *Winchell et al. v. Edwards et al.* 41.

PROOF OF PROMISE TO MARRY.

16. *Express promise need not be shown.* To prove a contract of marriage, an express promise need not be shown. A mutual engagement may be inferred from constant and devoted attentions gladly welcomed, from reciprocal affection, and the interchange of letters expressive of earnest love. *Rockafellow v. Newcomb*, 186.

BURDEN OF PROOF.

17. *As to title to land sought to be condemned for a right of way.* Where a railway company presented a petition for the condemnation of a right of way over the land of a certain person, alleging therein that such person was the owner of the land, and the report of the commissioners, chosen at the suggestion of the company, also showed that he was the owner, and it further appeared that at the commencement of the proceedings for condemnation, the person so alleged to be the owner of the land was in possession, it was *held*, he was not required to establish his title by proof in order that he might contest the matter of compensation. The relations of the parties in respect to the burden of proof in that regard, is different where the company institutes the proceedings and acknowledges the title, from what it is where the alleged owner applies for the assessment of damages against the corporation. *Peoria & Rock Island Railway Co. v. Bryant*, 473.

18. *In an action of replevin—when upon the plaintiff.* See REPLEVIN, 1.

EVIDENCE IN COLLATERAL PROCEEDINGS.

19. *In respect to the sufficiency of the service of process.* See PROCESS, 2.

PROOF OF EXECUTION OF INSTRUMENT.

20. *Under what state of pleading required, before a justice of the peace.* See PLEADING AND EVIDENCE, 16, 17.

WAIVER OF FORMAL PLEADINGS.

21. *Admissibility of evidence.* See PLEADING AND EVIDENCE, 18.

DEED ABSOLUTE IN FORM, AS A MORTGAGE.

22. *Degree and character of proof required.* See MORTGAGES, 2 to 5.

AUTHORITY OF ONE PARTNER AFTER DISSOLUTION.

23. *What is sufficient evidence thereof.* See PARTNERSHIP, 7.

EVIDENCE UNDER CERTAIN ISSUES. See PLEADING AND EVIDENCE.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

EXCEPTIONS.

1. *In chancery.* It is not necessary to except to the ruling of the court in a suit in chancery for improperly refusing a motion for a rule upon the defendant to a cross bill, to answer the same. The rules of chancery practice do not require that exceptions should be taken to the various decisions of the court made in the progress of the cause. *Chicago Artesian Well Co. v. Connecticut Mutual Life Insurance Co. et al.* 424.

EXECUTION.

WHAT IS THE SUBJECT OF LEVY AND SALE.

1. *Of an equity of redemption.* The judgment debtor's equity of redemption in land sold under execution issued against him, is not such an interest as can be taken and sold under execution, and where the land is subsequently sold under another execution against the debtor, before the time allowed by law for him to redeem from the former sale has expired, such subsequent sale is void, and the purchaser thereat acquires no right or title to the premises. *Cook v. City of Chicago et al.* 268.

2. *Chattel mortgage.* Where creditors hold an execution against the mortgagor of chattels, they may sell such chattels, subject to the lien of the prior mortgage, and equity will not enjoin such a sale. *Spaulding et al. v. Mozier et al.* 148.

WHETHER IT MAY ISSUE AFTER SEVEN YEARS.

3. Upon a judgment obtained in a court of record, execution may issue against the judgment debtor, if one was issued within a year and a day, and its collection be enforced against the real estate of the debtor except "as against *bona fide* purchasers and subsequent incumbancers, etc.," after the expiration of seven years, and at any time within twenty years.* *Stribling et al. v. Prettyman*, 371.

4. WALKER and SCOTT, JUSTICES, hold that execution can not lawfully issue after the expiration of seven years, except upon a *scire facias* to revive the judgment. *Ibid.* 371.

NOTICE OF SALE ON EXECUTION.

5. *Who may avail of defects therein.* Where land is sold under execution, and the notice of sale given by the officer is not in compliance with the law, but the defendant in the execution has submitted to it, a stranger to the record can not avail of such irregularity, in a collateral proceeding. *Cook v. City of Chicago et al.* 268.

*The act of March 23, 1872, (Sess. Acts, 506, sec. 6,) provides:

"No execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien, except upon the revival of the same by *scire facias*; but real estate levied upon within said seven years, may be sold upon a *venditioni exponas*, at any time within one year after the expiration of said seven years."

EXECUTION. *Continued.*

EXECUTION DIRECTED TO CORONER.

Presumption. See **PROCESS**, 1.

OFFICER'S RETURN ON EXECUTION.

As to description of land sold—whether sufficient. Same title, 9.

SALES UNDER EXECUTION. See **SALES**.

FALSE IMPRISONMENT.

PLEADING IN ACTION THEREFOR. See **PLEADING**, 4 to 10.

ARREST UNDER PROCESS.

Justification depending on jurisdiction of the court. See **TRESPASS**, 9.

FORCIBLE ENTRY AND DETAINER.

OF THE POSSESSION REQUIRED.

1. *And herein of joint tenants.* In this form of action, two questions must arise, first, as to the exclusive possession of the plaintiff, and second, the invasion of his possession by the defendant. *Jamison v. Graham*, 94.

2. Where there was evidence tending to show both plaintiff and defendant used the premises jointly, as a pasture, it was error in the court to instruct the jury that the plaintiff might recover, if he was in possession, without reference to defendant being also in possession. The instructions should have informed the jury that plaintiff, to recover, should have had exclusive possession. *Ibid.* 94.

3. To maintain an action of forcible entry and detainer, it is not necessary that the plaintiff should have a *pedis possessio*; it is sufficient, if the premises are used and occupied for some useful purpose; but if such possession is joint, as to different persons, neither one would be entitled to the exclusive possession. *Ibid.* 94.

4. Even if one joint tenant could maintain this action against another, who has taken exclusive possession, still that could not apply to a case where the parties occupy the premises jointly, and one party seeks to recover the entire premises, to the exclusion of the other. One joint tenant can not recover the exclusive possession of the premises against his co-tenant. *Ibid.* 94.

FORFEITURE.

WHO MAY DECLARE A FORFEITURE.

1. *Of a subsequent purchaser.* A subsequent purchaser of land, with notice of the prior sale, will hold subject to all the rights of the first purchaser; and though the prior purchaser may be in default, so that his vendor would be entitled to declare a forfeiture of his contract, at

FORFEITURE. WHO MAY DECLARE A FORFEITURE. Continued.

his option, yet that would not avail the subsequent purchaser, the vendor having the sole right to exercise such option. *Dart v. Hercules et al.* 446.

2. *Of the power of a swamp land commissioner in that regard.* See **SWAMP AND OVERFLOWED LANDS.**

AS BETWEEN VENDOR AND PURSHASER.

3. *Whether the vendor may declare a forfeiture when he can not perform.* See **VENDOR AND PURCHASER, 1.**

WHAT CONSTITUTES SUCH DECLARATION. See **CONTRACTS, 4.**

FORMER DECISIONS.**ATTACHMENT OF BOATS AND VESSELS.**

1. *Under act of 1857.* The cases of *Williamson v. Hogan*, 46 Ill. 504, and *The Tug Montauk v. Walker & Co.* 47 Ill. 335, so far as they hold that, under the act of 1857, no lien is expressly created against vessels by the contract for furnishing supplies, and in furnishing them, are overruled. *Barque "Great West No. 2" v. Oberndorf et al.* 168.

AMENDMENT OF OFFICER'S RETURN.

2. The true rule of practice is, that the court should grant leave to a sheriff to amend his return to process, as a matter of course, and without notice to the party to be affected by it, only during the term at which the cause is determined, or at a previous term. The cases of *Turney v. Organ*, 16 Ill. 43; *Dunn v. Rodgers*, 43 Ill. 260; *Moore v. Purple*, 3 Gilm. 149, and *Morris v. The Trustees of Schools, etc.* 15 Ill. 266, in so far as they announce a different rule, modified. *O'Conner et al. v. Wilson et al.* 226.

FORMER RECOVERY.**RES ADJUDICATA.**

1. *What so considered.* When a complainant in chancery presents his cause of action before the court, he should bring forward and urge all the reasons which then exist for its support. After a determination of the suit, the controversy can not be re-opened to hear an additional reason, which before existed, and was within the knowledge of the party, in support of the same cause of action. *Rogers v. Higgins et al.* 244.

2. The principle of *res adjudicata* embraces not only what has actually been determined in a former case, but also extends to any other matter properly involved, and which might have been raised and determined in it. *Ibid.* 244.

WHETHER A BAR.

3. In a suit between two persons, a judgment between other parties than those to the action pending can not be used as a bar to a recovery, nor can such a judgment between the same parties be so used unless

FORMER RECOVERY. WHETHER A BAR. Continued.

the former suit was for the identical cause of action, and the same breaches sued for in the action being tried. *Miller et al. v. McManis*, 126.

PLEA OF FORMER RECOVERY.

4. *Allegations and proofs.* See **PLEADING AND EVIDENCE**, 4.

FRAUD.**FALSE REPRESENTATIONS.**

1. *When matter of opinion merely.* The purchaser of a lot of ground, in negotiating for the purchase, the lot being at the time in possession of a third person who claimed title thereto, after informing the vendor that the title was still in her, under the law, represented that it was doubtful about the recovery of the lot: *Held*, such representation was a matter of opinion only—the vendee's disparagement of the property, where the vendor is not presumed to trust to the vendee, but to rely upon his own judgment. *Rogers v. Higgins et al.* 244.

2. *Where no injury results.* A court of equity will not set aside a contract on the ground of fraud, unless the party seeking relief has been misled to his prejudice or injury. Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage. *Ibid.* 244.

WAIVER OF FRAUD.

3. *By subsequent action.* If a party has knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief. A party defrauded can not be allowed to deal with the subject matter of the contract, and afterwards rescind it. *Ibid.* 244.

MISREPRESENTATIONS BY A VENDOR.

As to condition of title—effect thereof upon the rights of the parties.
See **VENDOR AND PURCHASER**, 4.

JUDGMENT OBTAINED BY FRAUD.

Set aside in chancery. See **CHANCERY**, 12, 18.

RESCINDING A CONTRACT FOR FRAUD.

Laches. See **CHANCERY**, 11.

FRAUDULENT CONVEYANCES.**AS AGAINST WHOM THEY MAY BE BINDING.**

1. It has been held that, however fraudulent a deed may be as against creditors of the grantor, it still may be binding as between the parties to the instrument. This principle is in no way changed by the chattel mortgage act of this State. *Upton et al. v. Craig*, 257. See **MORTGAGES**.

FRAUD AND CIRCUMVENTION.

IN OBTAINING THE EXECUTION OF A NOTE.

1. *What constitutes.* In an action on a promissory note brought by an innocent assignee thereof, before maturity, for a valuable consideration, against the maker, it appeared the defendant was approached while at work in his field by two patent right venders who proposed that he become agent for a cultivator and seeder, which they represented as possessing marvelous good qualities, and as the best in existence. He declined. They urged, lauding the machine, and representing the profitable character of the undertaking. He finally assented to accept the agency, when a paper purporting to be a contract between the parties was read to him by one of the men, which he without reading signed. The defendant was no scholar and could not read much. The paper was a long one, and he did not know whether he signed it in the middle or at the end. There was no consideration given, and no machine ever sent to the defendant. The note sued upon, it seems, was in some way incorporated in this paper, and under the circumstances, was regarded as having been obtained by such fraud and circumvention as precluded a recovery. *Puffer v. Smith*, 527

2. *By whom the fraud must be perpetrated to render the defense availing.* An assignee before maturity of a promissory note, purporting to have been executed by several, brought suit thereon against one of the makers, who pleaded that one of the principal makers had induced him to join in the execution of the note, on the representation that another person had already signed the same, when in fact the signature thereto of such other person was a forgery: *Held*, that the plea was at least defective for this, if for no other reason, that it did not aver that the payee or the assignee of the note was privy to the alleged fraudulent or false representation. *Gridley v. Bane*, 529.

3. Where the evidence shows a promissory note was obtained by fraud and circumvention, and the defendant had used due diligence when the note was obtained, the defense is complete. *Glasier v. Streamer*, 91.

GAMING CONTRACTS.

WHAT CONSTITUTES.

1. *Indorsement of drafts.* A party in possession of two drafts for \$1000 each, drawn in his favor, having lost \$1500 at gaming, indorsed the same and delivered them to the winner, receiving by way of change, \$500 in money: *Held*, that under our statute against gaming the indorsement was void, and the property in the drafts remained in the payee; and although in the hands of an innocent holder for value, the legal consequence of such an indorsement must, under the statute, be the same—that no more effect could be given to it than to a forged indorsement. *Chapin et al. v. Dake*, 295.

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GAMING CONTRACTS. WHAT CONSTITUTES. *Continued.*

2. *Chancery, jurisdiction.* A court of equity has jurisdiction in such case to compel the holder to surrender the drafts to the payee. *Chapin et al. v. Dake*, 295.

3. *Terms of relief.* But the payee, to entitle him to recover the drafts, should pay to the holder the \$500 which he received by way of change in paying his loss with the drafts. *Ibid.* 295.

4. *Interest, whether can be recovered.* Nor should he be allowed interest on the drafts. All the statute enables him to recover, is the money or thing lost, with costs. *Ibid.* 295.

GUARDIAN AND WARD.

PURCHASING LAND WITH THE WARD'S MONEY.

1. Three persons owned an "improvement" on land belonging to the United States. One of them died, leaving children, of whom one of the surviving owners became guardian, receiving money in that capacity, which he loaned upon mortgage security, as required by law. Afterwards the two surviving owners of the improvement purchased the land from the government in their own right. Upon bill filed by the wards to have a trust declared in their favor in respect to such portion of the land as would be embraced in their father's interest in the "improvement," it was held to be no part of the guardian's duty to appropriate any portion of the wards' money towards the purchase of any of this land for them. *Attridge et al. v. Billings et al.* 489.

2. Guardians will not, ordinarily, be permitted to change the personal property of the infant into real property, or the real property into personalty. *Ibid.* 489.

SURETIES ON GUARDIAN'S BOND.

Extent of their liability. See SURETIES, 1, 2.

SUIT ON GUARDIAN'S BOND.

When it may be brought. See ACTIONS, 2.

HEIRS.

BOUND BY JUDGMENT AGAINST ANCESTOR. See MORTGAGES, 9.

POSTHUMOUS HEIRS. See DESCENTS, 1.

HIGHWAYS.

LAYING OUT PUBLIC HIGHWAY.

1. *Action of majority only of commissioners required.* In laying out a road, the action of a majority of the commissioners thereon is sufficient to render their proceeding valid, the statute having expressly provided that whenever the commissioners of highways shall receive a petition for a highway, "they, or a majority of" them "may proceed to act in the premises." *Hall et al. v. The People ex rel. Rogers et al.* 307.

HIGHWAYS. *Continued.***ASSESSMENT OF DAMAGES.**

2. *Agreement with owners.* In a proceeding to compel highway commissioners to open a public road, upon objection that the commissioners never sought to agree with the several owners of land over which the road was to be constructed, before they proceeded to assess the damages that they would severally sustain, it was *held*, not indispensable that they should. They might lawfully proceed to assess the damage without first inquiring of the owner of the land whether they could agree with him as to the amount of damage he would sustain, that part of the statute being simply directory and not mandatory. *Hall et al. v. The People ex rel. Rogers et al.* 307.

NOTICE TO OWNERS TO REMOVE FENCES.

3. *Extension of time by commissioners.* As a general rule, the sixty days' notice required by the statute to be given to the owners of land over which a road has been located, to remove their fences, should be given upon the laying out of the road, if the determination of the commissioners shall not have been appealed from. But, although there does not appear to be any express authority conferred upon the commissioners to give an extension of time, that provision of the statute should have a reasonable construction, and doubtless, cases may arise where it would not be the duty of the commissioners to proceed at once to open the road; as where a road has been laid out through cultivated and enclosed lands, at a season of the year when there are growing crops on the same, it would not be unreasonable to allow the owners sufficient time to gather their crops. Yet the mere fact that it would be impracticable, on account of the wet weather of the season succeeding the time at which the road is located, to open and put the same in repair, would not of itself be sufficient to authorize the commissioners to give an extension of time for the removal of fences. Or where the owners of lands have planted crops after the final location of the road, it seems they should not for that reason be allowed an extension of time for the crops to mature and in which to gather the same. *Ibid.* 307.

GRADE OF STREETS IN A CITY.

4. *Control of the city over the grade thereof—liability to individuals in respect thereto.* A city has full control over the grade of its streets, and may adopt such angle as the authorities may choose, and may lower or elevate it, at will, and the owners of lots adjacent to the street can not call it to account for errors of judgment in fixing the grade, or recover damages for inconvenience or expenses produced in adjusting the level of their premises with the street. But a city has no more power over its streets than a private person has over his own land, and the city, under the plea of public convenience, can not be allowed to exercise that dominion, to the injury of the property of another, in

HIGHWAYS. GRADE OF STREETS IN A CITY. *Continued.*

a mode that would render an individual liable to damages, without itself becoming responsible. The rule of law which protects the right of property of one individual against another individual, must protect it from similar aggressions on the part of municipal corporations. *City of Aurora v. Reed et al.* 29.

5. If a city, in fixing the grade of a street, turns a stream of water and mud on the grounds or cellar of a citizen, or creates in his neighborhood a stagnant pond that generates disease, it becomes liable to respond in damages. *Ibid.* 29.

6. Where the city, through its proper officer, fixes the grade of a street, and property owners improve the street under the direction of the officer, and the improvement of the street is so made that water from rains and melting snow runs to and discharges itself over a lot owned by an individual, the city is liable for damages. The city has no right to turn surface water on private property, nor does it change the principle that the street was improved before the lot was. Nor does it change the liability of the city, by showing that other property owners on the street filled up a portion thereof in front of their lots, so as to turn the water on plaintiff's house. If the officials of a city permit persons to place obstructions in the streets, the city will be liable for injury resulting therefrom. *Ibid.* 29.

7. It is no defense to show that plaintiff might have dug ditches that would have protected his property; he was under no legal obligation to do so, and the city was. It was the duty of the city to provide proper sewerage to carry off such water. It is armed with ample power to provide proper means therefor; if necessary it could condemn ground for the construction of sewers, or use the streets therefor as far as practicable. *Ibid.* 29.

POWER OF CITIES TO ABOLISH SIDEWALKS.

8. *Rights of adjacent lot owners.* The owner of a tract of land, laid the same out into blocks and lots, as an addition to the city of Chicago, dedicating a strip of ground in front of the lots to the public, for the purposes of a street, reserving, however, a space between the lots and the street so dedicated, for the purposes of court yards only: *Held*, the city authorities had no power to appropriate such portion of the space so dedicated as a street, to the purpose of a roadway merely, as would deprive the owners of lots on one side of the street and fronting thereon, of a sidewalk between the court yards thus reserved and the roadway proper. *Carter v. City of Chicago et al.* 288.

TOWNSHIPS—NEGLIGENCE.

9. *Of their liability to a private action for neglect of duty in keeping highways in repair.* Organized townships, established by law as civil divisions of counties merely, are not liable, in their corporate capacity,

HIGHWAYS. TOWNSHIPS—NEGLIGENCE. Continued.

to a private action for damages occasioned by their neglect to keep their public highways in repair. *Bussell, Adm'r v. Town of Steuben*, 85.*

TO COMPEL THE OPENING OF A HIGHWAY.

Remedy by mandamus, and the proceedings thereunder. See **MANDAMUS**, 1 to 5.

INJUNCTION AGAINST A CITY.

To restrain it from an abuse of power in respect to the use of its streets. See **INJUNCTIONS**, 2, 3.

DEDICATION FOR A HIGHWAY. See DEDICATION.**HOMESTEAD.****TO WHAT CHARACTER OF ESTATE IT ATTACHES.**

1. *Of a term for years.* The benefits of the homestead law are not confined to an ownership in fee, but attach to the house and lot to which the debtor has such a term as may be sold on execution. The object of the statute is to protect the owner and his family in a home, free from sale under judgment or decree; and a tenant for years is as clearly within the reason of the statute, as the owner of a larger estate. The statute was designed to protect estates liable to sale on execution or decree, and a term for years is such an estate. The owner of a term for years, is an owner to that extent. *Conklin et al. v. Foster*, 104.

2. A tenant for years, owning a house on the premises, and occupying it with his family, has a right to hold it free from levy and sale under an attachment or execution, and a purchaser at such a sale acquires no title thereby. *Ibid.* 104.

SALE OF HOMESTEAD BY THE DEBTOR.

3. The owner of a homestead, although a judgment debtor, may sell and convey his homestead, and the purchaser will take the title free from any lien of the judgment, as property thus situated is not liable to levy and sale, and no lien of a judgment attaches to it. *Ibid.* 104.

4. Where the judgment debtor, owning and occupying a homestead, sells the property to a junior judgment creditor, the purchaser takes the title free from the lien or claim by sale under execution by a senior judgment creditor. A sale of such property under an execution being inoperative, the purchaser thereat takes no title. *Ibid.* 104.

*It was decided, in the case of *White, Adm'r v. The County of Bond*, January Term, 1871, 58 Ill. 297, that a county was not liable, in its corporate capacity, to a private action for injury resulting from a defective highway.

HOMESTEAD. Continued.**ILLEGAL SALE UNDER EXECUTION.**

5. *Whether it may be set aside as to part of the premises sold.* Where it was sought to set aside a sale under execution, of four lots of ground, for the reason that, as claimed by the defendant in the execution, the same constituted his homestead, and had been sold without summoning a jury to set off the homestead, as required by the statute, it was *held*, the lots being sold separately, and the one on which his house was situated being worth more than \$1000, a decree setting aside the sale as to such lot alone was proper, and gave to the complainant all the relief to which he was entitled. *Linton et al. v. Quinby*, 271.

6. Though, had the lots been sold in a body, it would have been impossible to give this relief without setting aside the sale as to the other lots. *Ibid.* 271.

IMPRISONMENT.**POWER OF THE COUNTY COURT.**

To imprison an administrator for non-compliance with an order to pay debts. See **ADMINISTRATION OF ESTATES**, 6, 7, 8.

IMPROVEMENTS.**OF ALLOWANCE THEREFOR.**

1. *On setting aside the title of the party claiming them.* See **CHANCERY**, 24.

SUBSEQUENT PURCHASER WITH NOTICE.

2. *Whether he will be allowed for improvements.* See **PURCHASERS**, 8.

IMPROVEMENTS ON PUBLIC LANDS.**SUBSEQUENT SALE BY THE GOVERNMENT.**

1. The owner of an "improvement" on the public lands can not set the same up in bar of any action by a *bona fide* purchaser of such lands from the United States. While such "improvements" are regarded as *property* in this State, the right expires on a sale of the land by the government to a third person. *Attridge et al. v. Billings et al.* 489.

INCUMBRANCE.**VENDOR AND PURCHASER.**

1. *Effect of an existing incumbrance on the right of a vendor to declare a forfeiture for non-payment.* See **VENDOR AND PURCHASER**, 1, 2.

2. *Where purchaser seeks a specific performance, effect of existing incumbrance as an excuse for delay in payment.* See **CHANCERY**, 19, 20.

CONDEMNATION OF RIGHT OF WAY. See **VENDOR AND PURCHASER**, 6 to 9.

INJUNCTIONS.

WHEN AN INJUNCTION WILL LIE.

1. *In respect to a right of way.* Where a party is entitled to a right of way, of which a subsequent purchaser of the land had notice, equity has jurisdiction, as the injured party has no adequate remedy at law, and will perpetually enjoin such purchaser from obstructing the right of way. *McCann et al. v. Day*, 101.

2. *To enjoin a city from an abuse of power in respect to the use of its streets.* Where the authorities of a city undertake, by ordinance, from fraudulent and malicious motives, to appropriate so much of one side of a street to the purposes of a roadway, as will deprive the adjacent property owners of any sidewalk, a court of chancery has jurisdiction to interpose by injunction, at the instance of the property owners, to restrain the city from the execution of such an ordinance. *Carter v. City of Chicago et al.* 288.

3. A city holds the fee of its streets in trust for the benefit of all the corporators, and in case of a violation of such trust by an excess or abuse of power, and in bad faith, by public officers, as in such a case, which would result in an injury to the rights and property of an individual, the court has jurisdiction, and will not inquire whether the injury will be irreparable. * *Ibid.* 288.

4. *To restrain a tax deed from issuing.* Where a combination is entered into by the collector and the principal bidders at a tax sale, to prevent competition at the sale, and that the lands should be struck off to one of the parties, for the sums charged to the respective tracts, and bidding was thus prevented, the court will enjoin the collector from making a deed to a party to the fraud. *Gage et al. v. Graham et al.* 144.

5. *Assessment under unconstitutional law.* An injunction will lie to restrain the collection of a tax assessed by a mere private corporation, any law authorizing such assessment being unconstitutional. *Ibid.* 144.

6. *To prevent an invasion of burial places.* Where certain town authorities, without right, invaded grounds purchased and appropriated by a church organization for the purposes of a cemetery, with the view to open a highway through the same: *Held*, such act of invasion was not merely a trespass for which there was such adequate remedy at law as to exclude the jurisdiction of a court of chancery, but that court had jurisdiction by injunction to restrain the commission of the wrong, and to quiet the parties entitled in the possession and use of their cemetery. *Trustees of the First Evangelical Church et al. v. Walsh et al.* 363.

* See also *City of Peoria v. Johnston*, 56 Ill. 45.

INJUNCTIONS. *Continued.*

ASSESSMENT OF DAMAGES ON DISSOLUTION.

7. *Attorney's fees.* The statute providing for an assessment of damages on the dissolution of an injunction, was only intended to reimburse the defendant for moneys which he has paid, or for which he has become liable, on the motion to dissolve. He can not recover for attorney's fees arising from litigation upon a cross bill in the same suit, but not connected with the injunction, or from litigation under the original bill subsequent to the hearing on the motion to dissolve. *Jeane & Almini v. Osgood et al.* 840.

8. Nor, in case the defendant is himself an attorney and attends to his own case, can he be allowed a fee for his own services. *Ibid.* 840.

9. In ascertaining the amount which should be allowed as attorney's fee in such proceeding, it is not enough to prove by attorneys that the sum named is, in their opinion, reasonable. The inquiry should be, what has the defendant paid, or become liable to pay, and is it the usual and customary fee paid for such services. The chancellor should refuse to allow exorbitant and oppressive charges. *Ibid.* 840.

10. In this case, the sum of \$250 as an attorney's fee for entering and trying a mere motion to dissolve an injunction was deemed excessive. *Ibid.* 840.

11. *Continuance.* The proceeding by the court on the dissolution of an injunction, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, to hear evidence and assess the damages is not a new proceeding, but follows as a part of the original proceeding, upon the dismissal of the bill and dissolution of the injunction; and if either party desire a continuance, he should show grounds for it in the usual mode, by affidavit. *Holmes v. Statler et al.* 209.

12. *Trial by jury in such case—whether allowable.* See JURY, 1.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *May state the legal effect of evidence.* In an action of ejectment, where a register's certificate of purchase was given in evidence, it was held proper to instruct the jury that the certificate was evidence of title in the person to whom it was issued, and that a judgment and execution against such person, together with a sheriff's deed thereunder, conveyed the title to the grantee therein. While instructions should not assume the existence of facts, still it is proper for the court to direct the jury as to the legal effect of the evidence admitted. *Stribling et al. v. Prettyman*, 371.

INSTRUCTIONS. *Continued.*

OF THE QUESTION OF NEGLIGENCE.

2. *Who may determine what facts constitute negligence.* In an action against a railroad company to recover for the killing of plaintiff's cows by the defendant's train, an instruction which directed the jury on behalf of the plaintiff "that if they believed, from the evidence, that the engine driver by the use of ordinary skill and prudence could have seen the cows spoken about by the witnesses, or that he did see the cows, and that he might without danger, by the use of ordinary care, have stopped the train before striking the cows, and did not, that this would be negligence on the part of the defendants," upon objection that the court by the instruction encroached on the province of the jury in telling them that a certain state of facts constituted negligence, was regarded as not open to such objection. *Toledo, Peoria & Warsaw Railway Co. v. Bray*, 514.

INSURANCE.

VERBAL CONTRACT OF INSURANCE.

1. *Whether binding.* A verbal contract to insure, based upon a sufficient consideration, and made by a party having an insurable interest in the property, with an agent having the requisite authority to bind his principal by such contract, may be legal and binding upon the insurance company. *Hartford Fire Insurance Co. v. Wilcox*, 180.

MUTUAL, AND STOCK COMPANIES.

2. *Of the relation of the assured to the company.* Where there is a provision in the charter of a mutual insurance company, that they may receive premiums in money and take risks in the same manner that is done by stock companies, and a person insures his property in the company and pays the premium in money, he can not be held to be a member of the company. *Illinois Fire Insurance Co. v. Stanton*, 354.

MORTGAGOR—MORTGAGEE.

3. *And herein, who may sue.* The mortgagor, as well as the mortgagee, has an insurable interest in the real estate insured. And when the mortgagor effects an insurance of the property, "loss, if any, payable" to the mortgagee, the former holds the legal title, and when a loss occurs, the mortgagor may maintain an action on the policy in his own name for the use of the mortgagee; but as was held in the case of the *New England Fire and Marine Insurance Co. v. Wetmore*, 32 Ill. 221, an assignee of a policy can not sue in his own name. *Ibid.* 354.

4. Where a party produces the policy in his name, and makes the proof of loss, he thereby makes a *prima facie* case entitling him to recover. *Ibid.* 354.

INSURANCE. *Continued.*

SALE BY THE ASSURED.

5. *Of the consent of the company—and of the action of agents in that regard.* Where a plea averred that such a policy contained a condition that on the alienation or sale of the property insured, the insurance should cease and be void, unless the policy should be duly assigned or confirmed by the consent of the directors, previous to the loss, and no policy should be regarded as assigned, unless the consent of the directors be certified thereon by the secretary of the company, and it was averred that the mortgagor, to whom the policy was issued, sold the premises to another person without the consent of the directors, but the plea failed to aver that the sale was made before the loss occurred, and it failed to aver that the directors did not confirm the same: *Held*, the plea was bad on demurrer, as it is not essential to the validity of such assignment that consent shall be had before the sale, as it will be sufficient if had before the loss occurs. *Illinois Fire Insurance Co. v. Stanton*, 354.

6. Where agents of an insurance company were applied to for consent to a conveyance of the insured property, and the policy contained such a condition as that set out in the plea, and they consented, and said the policy would be good until it could be received from another place, and the consent indorsed, and it appeared the agents had been in the habit of giving such consent, and the company had recognized its validity: *Held*, that the company must be bound by the consent of the agents thus given. *Ibid.* 354.

7. A conveyance of the insured property, without the consent required by such a condition in a policy, would authorize the company to declare the policy forfeited; but as no steps were taken to declare it, and as the local agents gave their consent to the transfer of the property, the company is estopped from denying that they assented to the sale of the property. *Ibid.* 354.

8. *Waiver by the company.* Such a condition as that set out in the plea, in a policy, is inserted for the benefit of the company, and they can waive it like any other condition. And knowing that it has been violated, and permitting the other party to act on the supposition that they have assented to the act, and have waived the breach, prevents the company from retracting such consent. *Ibid.* 354.

INTEREST.

WHETHER RECOVERABLE.

1. *On compelling surrender of drafts paid in a gaming transaction.*
See GAMING CONTRACTS, 4.

AT WHAT RATE RECOVERABLE.

2. Where a mortgage was given to secure indebtedness not evidenced by any instrument outside of the mortgage itself, but the proof

INTEREST. AT WHAT RATE RECOVERABLE. *Continued.*

showing when it was contracted, and there being no special contract as to the rate of interest, it was not error for the court to decree the legal rate of interest thereon, in a suit to foreclose the mortgage. *Babcock et al. v. Lisk*, 327.

WHERE TRUSTEE USES THE TRUST FUND.

3. *Of annual rents.* See **TRUSTS AND TRUSTEES**, 9.

JOINT TENANTS.

OF EXCLUSIVE POSSESSION BY ONE. See **FORCIBLE ENTRY AND DETAINER**, 1 to 4.

JUDGMENTS.**VACATING JUDGMENT AT SUBSEQUENT TERM.**

Not allowable on motion in the same court. See **MOTION**, 1.

CONFESSION OF JUDGMENT. See **CONFESSION OF JUDGMENT**.

JUDICIAL SALES. See **SALES**.**JURISDICTION.****JURISDICTION OF THE SUBJECT MATTER.**

1. *Whether affected by the want of parties in interest.* See **ADMINISTRATION OF ESTATES**, 1.

2. *Or by the fact that an administrator applying for an order to sell land to pay debts, was also guardian of the minor heirs.* Same title, 2.

IN OBTAINING RIGHT OF WAY.

3. Where a corporation organized under the general law of 1859, for constructing a plank, gravel or macadamized road or pike, seeks to acquire the right of way under the provisions of that act, the court to which application is made will acquire jurisdiction of the subject matter by the presentation of the petition. *Skinner et al. v. Lake View Avenue Co.* 151.

JURISDICTION OF THE PERSON.

4. *In statutory proceedings—notice must appear on the face of them.* See **NOTICE**, 4, 5; **ADMINISTRATION OF ESTATES**, 3, 4.

5. *And herein of the service of process, and how determined.* See **PROCESS**, 2 to 5.

JURISDICTION IN CHANCERY.

6. *At what stage of the proceedings it may be questioned.* See **PRAC-TICE**, 1.

7. *Of the jurisdiction, generally.* See **CHANCERY**.

OF THE COUNTY COURT.

8. *Character of its jurisdiction—whether general or inferior.* See **PLEADING**, 10.

JURY.

TRIAL BY JURY.

1. *On an assessment of damages upon dissolution of an injunction, it is discretionary with the court whether there shall be a trial by jury. Holmes v. Stateler et al. 209.*

JURY MUST DECIDE FACTS.

2. *Not the court.* It is erroneous for the court, in instructions, to assume that facts are proved, but should leave the jury to find the facts. So, in an action of forcible entry and detainer, the court should not, by instructions, prevent the jury from finding, on the evidence, whether there was a joint possession by the parties. *Jamison v. Graham, 94.*

OF THE QUESTION OF NEGLIGENCE.

3. *Who may determine.* See INSTRUCTIONS, 2.

JUSTICES OF THE PEACE.

CONSOLIDATION OF CAUSES OF ACTION.

1. *Suit subsequently brought by defendant—construction of act of 1845.* Under section 35, chapter 59, Revised Statutes of 1845, where a party commences his action before a justice of the peace, the adverse party, if he have any demands existing at the time of the commencement of the suit, must bring forward the same to be litigated in that particular suit, if the same are of such a character that they can be consolidated, and which do not exceed \$100 when consolidated into one defense, and failing to do so, and the suit proceeds to final judgment, he is forever debarred from the privilege of suing for any such debt or demand. *Lathrop v. Hayes, 279.*

2. So, where a party commenced an action before a justice of the peace, against another, and as soon as service of process was had, the defendant commenced an action against the plaintiff, before another justice, the claims of both parties being under \$100, and of such a nature that they could have been legally consolidated in one action and defense, and the suit first commenced having progressed to final judgment, and the defendant therein failed to set off his claim as the law required him to do, it was *held*, he could not maintain his action subsequently commenced in respect thereto, although he obtained judgment therein, by default, before the justice, an appeal being taken therefrom to the circuit court, prior to the rendition of the judgment in the suit previously commenced against him. *Ibid. 279.*

3. The statute, however, does not apply to actions commenced under the attachment laws of this State. For in such actions the defendant may have no actual, but only constructive, notice of the pendency of the suit, and therefore could have no opportunity to bring forward his demands, and ought not to be debarred of his right of action without a day in court. *Ibid. 279.*

LACHES. See LIMITATIONS.

LESSEE.

WHETHER A CONTRACT PASSES TO HIM.

1. The owner of a lot of ground in the city of Chicago, having erected a grain elevator thereon, was permitted, by contract with a railroad company, to connect a side track, extending from his elevator to the company's line, with its track. So far as appeared, the contract was purely personal, and in no way attached to the realty: *Held*, a subsequent lessee of the elevator did not succeed to any of the rights of his lessor in respect to such contract. *The People ex rel. Spruance et al. v. Chicago & Northwestern Railway Co.* 436.

2. *Of rights granted to the lessor by ordinance of the city.* Where the city had, by ordinance, granted to the lessor the privilege of laying down a track along one of its streets, in order that he might connect his elevator with the line of a railroad, such grant of authority being made specially to the lessor, the mere leasing of his elevator to a third person would not operate to pass to the lessee any of the rights secured to the lessor under the ordinance. *Ibid.* 436.

LICENSE.

OF LICENSE TO ENTER THE HOUSE OF ANOTHER.

When availing as a defense in an action of trespass. See TRESPASS, 1 to 8.

LIENS.

MECHANIC'S LIEN.

1. *When sufficiently established.* In a proceeding to establish a lien to secure payment for lumber sold by the complainants to the defendant, the evidence showed that the lumber was used in completing the building on the defendant's premises, and that it was furnished for that purpose at his request. This was regarded as sufficient to bring the case within the statute of 1861. *Corey et al. v. Croskey et al.* 251.

SURETIES OF SCHOOL OFFICERS.

2. *Lien upon their real estate—at what time it attaches.* Under the school law, the lien upon the real estate of a surety upon the official bond of the treasurer of a board of school trustees, in case of the default of such officer, will attach, if judgment shall thereafter be rendered, from the date of the issuing of process in a suit upon the bond, without reference to the time of service. *Snyder et al. v. Spaulding*, 480.

OF A SCHOOL TAX FOR A SPECIFIC PURPOSE.

3. *Holder of orders on the treasurer have an equitable lien.* See TAXATION, 5.

LIENS. *Continued.*

ATTACHMENT OF BOATS AND VESSELS.

4. *Under act of 1857—when the lien accrues, and herein of the priorities of liens, and time of enforcing them.* See ATTACHMENT OF BOATS AND VESSELS, 1 to 4.

LIMITATIONS.

LACHES, ASIDE FROM THE STATUTE.

1. *As to irregularity in sale under execution.* Where land was sold *en masse* under execution, and the defendant was present at the sale, and cognizant of the judgment, and manner in which the sale was conducted, and remaining in the country for nearly a year after the time for redemption had expired, and taking no steps to set the sale aside, and then leaving for California, there arises a strong presumption of acquiescence, and his heirs can be in no better position. *Winchell et al. v. Edwards et al.* 41.

2. *Delay in applying for leave to amend officer's return.* See AMENDMENTS, 8.

3. *Delay in seeking to rescind a contract for fraud.* See CHANCERY, 11.

MALICIOUS PROSECUTION.

OF MALICIOUSLY SUING OUT ATTACHMENT.

Remedy therefor. See CASE, 1.

MANDAMUS.

REQUISITES OF THE PETITION.

1. *In proceedings to compel commissioners to open highway.* Upon the filing of a petition for a writ of mandamus to compel the commissioners of highways of a certain township to take the necessary steps to open a road, which, as alleged, had been already laid out by a former board of commissioners of the township, and the damages to the several parties over whose land the road was to be constructed had been assessed against them, it being objected that it did not appear that the relators were citizens of the town, although it was regarded as more accurate if the petition had contained an express averment that the relators resided in the township, yet it appearing from the record that one of the relators was one of the commissioners who laid out the road, and that the other was one of the petitioners for the same, and so described in the proceeding, such allegation being nowhere in express terms denied in the return to the alternative writ, it was *held* sufficient in that regard. *Hall et al. v. The People ex rel. Rogers et al.* 307.

WHO MAY INSTITUTE THE PROCEEDING.

2. The act sought to have performed by the respondents, being a public duty, in which the people of the whole town were interested,

MANDAMUS. WHO MAY INSTITUTE THE PROCEEDING. *Continued.*

any citizen of the town had the right to become a relator and institute the proceeding. It was unnecessary for the relators to show they had any other interest in the object of the writ than that of mere private citizens interested in common with the public in the performance of the act. *Hall et al. v. The People ex rel. Rogers et al.* 307.

WHETHER THE PROPER REMEDY.

3. Upon it being insisted that inasmuch as the law imposed penalties upon the commissioners of highways, (Sess. Laws 1861, page 248, sec. 13,) for neglect of duties enjoined upon them, that therefore a person, although interested in the performance of those duties, could not invoke the aid of a writ of mandamus, it was *held*, that such was not a proper construction of that statute, the penalties there provided for being regarded as in addition to the common law remedies—that act in nowise repealing the remedies to which a party would be entitled at the common law. *Ibid.* 307.

4. Nor does sec. 4, of the act of 1867, entitled “an act to reduce the act to provide for township organization, and the several acts amendatory thereof, into one act,” which provides a mode for compelling the construction and repair of bridges and roads, where the same have been neglected by the town authorities, in anywise affect the common law remedies to which a party is entitled, or have any application, in cases of this character. *Ibid.* 307.

ALLEGATIONS AND PROOF.

5. *What necessary.* It was *held* essential, in this case, to the awarding of the writ, that the relators should aver and prove that the damages assessed to the land owners on the route of the road, had either been paid or released, or that there was money in the town treasury with which to tender or pay the same, or that the necessary funds were otherwise under the control of the commissioners. *Ibid.* 307.

6. The respondents in their return, claiming they were not bound to execute the writ, for the reason it was not their duty to open the road until after the owners of land over which the road would pass had been legally notified to remove their fences, and averring that no such notice had ever been given or served, it was *held*, such allegation presented an immaterial issue. The object of the proceeding being to compel the commissioners to take every initiatory step and to perform all official acts necessary to open the road, if the requisite notice to remove fences had not been given as required by the statute, and the proceedings in laying out the road were in all other respects legal, it was their duty to, and they should be compelled and required to give such notice. *Ibid.* 307.

CAN ONLY ISSUE ON THE AWARD OF THE COURT.

7. The clerk of the circuit court has no power to issue a writ of mandamus without an order of the court. The power to award the

MANDAMUS.**CAN ONLY ISSUE ON THE AWARD OF THE COURT.** *Continued.*

writ is in the court and not in the clerk, and it is only granted on good cause shown, and such time for the return is fixed by the court as may be reasonable and just. *The People ex rel. Breckenridge v. Brooks*, 142.

REQUISITES OF THE WRIT.

8. *Certainty.* The writ of mandamus must be certain, and clearly show on its face, that it is the duty of the defendant to perform the act sought to be enforced. The mandatory clause should, like the body of the writ, expressly state the duty required. *Ibid.* 142.

9. Where the petition for the call of an election to subscribe for a specified amount of stock in a railroad company, on several express conditions, and where the alternative writ required the town supervisor to call an election to vote, not as petitioned for, but whether the town would subscribe stock or donate to the railway, without stating amount or conditions, and where the peremptory writ misrecited the petition for the call of the election, but commanded the supervisor "to call an election of the legal voters of the town under the laws of this State:" *Held*, that the peremptory writ was erroneous, as it was too uncertain, in not following the petition for the call of an election. *Ibid.* 142.

MASTER AND SERVANT.**WILFUL ACTS OF THE LATTER.**

When the master liable therefor. See **MEASURE OF DAMAGES**, 6.

MEASURE OF DAMAGES.**UNDER A LIMITED CONTRACT.**

1. Where the agreement was to pay the plaintiff a certain sum for each machine sold in certain territory named, when the money should be collected for which such machines were sold, it was error to instruct the jury that they might allow such sum for each machine sold outside of the territory named when collected, and the jury having acted under the instruction and allowed such sums, the verdict was excessive, and a new trial should have been granted. *Miller et al. v. McManis*, 126.

IN TROVER.

2. *For the conversion of railway stocks.* The rule in this State is, that the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion, with interest from that time until the trial, and no exception is recognized where the property converted happens to be stocks. *Sturges et al. v. Keith*, 451.

3. *As to the time of estimating value.* Where the demand and refusal either constitute the conversion, or afford presumptive evidence of it,

MEASURE OF DAMAGES. INTROVER. Continued.

it is no infringement of this rule to regard *that* as the time for estimating the value. *Sturges et al. v. Keith*, 451.

4. *Of evidence admissible to fix value.* In an action of trover to recover for the alleged conversion of certain railroad stock, it was held to be competent for the plaintiff to give evidence tending to show that the railroad company was about to, and did, increase the stock, and that owners of stock were, by its regulations, to have a certain *pro rata* of the new stock at reduced rates,—not to enable the plaintiff to recover the value of the new stock as special damages, but as being a circumstance which would legitimately bear upon the question of the value of the stock converted. *Ibid.* 451.

EJECTING PASSENGER FROM RAILWAY CAR.

5. Where a passenger went upon a train of cars, and offered a worthless piece of paper, claiming it to be a pass, and on being informed it was not a pass, refused to pay fare or leave the train, and thereupon the servants of the company removed her from the train, it was *held*, in such case to be error to instruct the jury, in estimating damages, that they might consider whether the plaintiff in good faith believed she had a pass, and offered it in good faith, although the paper was not a pass. It was the duty of the passenger, on being informed that it was not a pass, to either pay the fare or leave the train at the first station. *Chicago, Rock Island & Pacific Railway Co. v. Herring*, 59.

EXEMPLARY DAMAGES.

6. *For using unnecessary force.* It is not error in such a case to instruct the jury, that if the servants wilfully and negligently injured plaintiff, they would be authorized to give exemplary damages; as they were engaged in the furtherance and execution of the business of the company, the company were liable for the misconduct and negligence of their servants when thus engaged. *Ibid.* 59.

7. *In trespass.* The law has, for the repose of society, authorized the jury to give exemplary damages, when a trespass is wanton, wilful or malicious, or when it is accompanied with such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong and to deter others from the perpetration of such acts. *Cutler v. Smith*, 252.

PECUNIARY ABILITY OF THE PARTIES.

8. *Whether to be considered.* In an action against two or more to recover for injury to the plaintiff, wherein the plaintiff is entitled to exemplary damages by reason of the conduct of the defendants, which occasioned the injury, being wilful, wanton or malicious, the pecuniary ability of one defendant should not be considered by the jury in determining the damages which a co-defendant shall have assessed against him. *Toledo, Wabash & Western Railway Co. v. Smith*, 517.

MEASURE OF DAMAGES. *Continued.*

CONDEMNATION OF RIGHT OF WAY.

9. *What proper to be considered in assessing damages.* See RIGHT OF WAY, 9.

MECHANIC'S LIEN. See LIENS, 1.

MISTAKE.

CHATTEL MORTGAGE.

1. *Whether equity will reform the instrument.* Where personal property is correctly described in a chattel mortgage, but the lot of ground upon which it is situated is misdescribed, such misdescription will be rejected as surplusage, and equity will not take jurisdiction to make a useless correction of the mortgage. *Spaulding et al. v. Mozier et al.* 148.

MORTGAGES.

WHAT DEBTS ARE EMBRACED THEREIN.

1. *Construction of a mortgage.* A mortgage which recited that it was given to secure the payment of a certain promissory note described therein, "and also in consideration of the further sum of five hundred dollars," to the mortgagor in hand paid, the receipt whereof was thereby acknowledged, he had "granted, bargained, sold and conveyed" the premises described in the mortgage deed, was construed as a security given for the payment of the promissory note mentioned, and also the sum of \$500 of other indebtedness. *Babcock et al. v. Lisk*, 327.

OF A DEED ABSOLUTE IN FORM.

2. *Whether a mortgage—proof necessary to show.* In a proceeding in chancery to redeem a certain lot of ground from a mortgage, alleged to have been executed on the premises, to secure the payment of a debt owing by the grantor to the grantee, the deed being in form absolute, to change its character to that of a mortgage, it was held, to require clear proof that it was really but a security for the payment of the debt. *Lindauer v. Cummings, Exor. et al.* 195.

3. And evidence of loose declarations of the grantee in regard to his intentions was regarded as a dangerous species of evidence upon which to disturb the title to land, being extremely liable to be misunderstood or perverted, and the allowance of it for that purpose not in accord with the policy of the law requiring written evidence to attest the ownership of real property. *Ibid.* 195.

4. The kind of parol evidence properly receivable, to show an absolute deed to be a mortgage, is that of facts and circumstances of such a nature as in a court of equity will control the operation of the deed, and not of loose declarations of parties touching their intentions and understanding. *Ibid.* 195.

MORTGAGES. OF A DEED ABSOLUTE IN FORM. Continued.

5. It has been held that evidence of such declarations alone, is insufficient proof to show an absolute deed to be a mortgage. *Lindauer v. Cummings, Exor. et al.* 195.

SUBSEQUENT PURCHASERS FROM MORTGAGOR.

6. *Of a remote purchaser, without consideration, the money being paid by another, as principal.* Where a person held real estate, and mortgaged it to secure a debt he owed, then sold the property, subject to the mortgage, and a third person recovered a judgment against the purchaser, and had an execution thereon, and subsequently the purchaser executed a mortgage to another person, and afterwards made an assignment of the mortgaged premises with other real estate to a trustee for the benefit of his creditors, and a few days afterwards the sheriff sold the property under the execution in his hands, when the trustee holding for the benefit of creditors, had the land bid in by and in the name of his clerk, but the trustee, out of the trust fund in his hands, paid the bid to the sheriff by his clerk, and charged it in his account of the trust fund, and the clerk paid nothing on the purchase, but he, some eleven years afterwards, procured a sheriff's deed for the property: *Held*, that he acquired no equity to or in the property by his sheriff's deed, and had no right to question an irregular sale under a prior mortgage. *Beach v. Shaw*, 17.

SATISFACTION, NOT REDEMPTION.

7. *What constitutes.* Where the assignee bid in the trust property in the name of his clerk, and paid the sheriff the amount of the judgment out of the trust funds in his hands, that operated simply as a satisfaction of the judgment, and let in the junior incumbrance next in rank to the first mortgage on the property, and if the purchaser from the first mortgagor were to be allowed to redeem, he would be required to pay not only the bid by the second mortgagee under the sale on the first mortgage, but the amount of the second mortgage to him. *Ibid.* 17.

8. It is conceded that the grantee of the mortgagor, whether claiming as trustee for others or in his own right, and whether a purchaser for value or a mere volunteer, has the same right to set aside such a sale as the mortgagor himself, but a court of equity would not set it aside for the benefit of one who has acquired the naked legal title as a mere formal purchaser, paying nothing, not expected by others to acquire any benefit, or intending himself to do so at the sale. *Ibid.* 17.

FORECLOSURE BY SCIRE FACIAS.

9. *For the use of a third person.* It is legal and proper for the mortgagee to foreclose a mortgage by *scire facias* for the use of another person. And such a judgment is valid and conclusive upon parties, and privies, the latter being of three kinds—by blood, in law, and by

MORTGAGES. FORECLOSURE BY SCIRE FACIAS. *Continued.*

estate. The heirs of a defendant to such a proceeding are privies, and concluded by the judgment. *Winchell et al. v. Edwards et al.* 41.

REDEMPTION—JUNIOR MORTGAGEE.

10. *And of third persons holding the naked legal title.* Where a prior mortgage falls due, and the property is sold by a trustee under a power in the deed, and a junior mortgagee becomes the purchaser at such sale, pays the money and enters into possession of the property and continues the possession: *Held*, such a person will not be disturbed by a person clothed merely with a naked legal title, but having no equitable rights; nor can the latter redeem from the sale under the mortgage. *Beach v. Shaw*, 17.

11. As a general rule, the holder of the legal estate under the mortgage is a proper person to redeem, whether he holds as trustee for others or in his own right by a voluntary conveyance from the mortgagor, but when such grantee asks something more than the mere right to redeem, as to set aside a sale previously made under the mortgage, on the ground of irregularity in conducting it, but which was fair, and at which a third party became a purchaser in good faith, and the sum paid with his own incumbrance exceeded the value of the property, such holder of the legal title must show that he has equities before he can redeem. *Ibid.* 17.

CHATTEL MORTGAGES.

12. *Whether fraudulent—and as to whom.* It has been held that, however fraudulent a deed may be as against creditors of the grantor, it still may be binding as between the parties to the instrument. This principle is in no way changed by the chattel mortgage act of this State. *Upton et al. v. Craig*, 257.

13. A purchased of B, as agent of C, a threshing machine belonging to the latter, and gave his three several promissory notes, secured by a mortgage thereon, and also on two horses, for the price, being \$695, but in making the mortgage, for some purpose not explained, induced the agent to specify in the mortgage, another note payable to his principal for \$200, which note, after holding a few months, the agent, his principal never at any time having had any knowledge of the matter, re-delivered to the purchaser. Upon objection that this fact avoided the mortgage, it was *held*, that while it might possibly have had that effect if a then subsisting creditor had been prejudiced by it, or it had operated so as to delay or hinder him in the collection of his debt, and as to such might be regarded as evidence of fraud, or the mortgage fraudulent *per se* and void, yet there being no subsisting creditors of the mortgagor at the time of the execution of the mortgage, other than the mortgagee, the mortgage was valid and binding, not only as between the parties, but also as to third persons or subsequent creditors. *Ibid.* 257

MORTGAGES. CHATTEL MORTGAGES. Continued.

14. *Possession in the mortgage—agency.* The mortgage gave to the mortgagee the right to take possession of the property on default of payment of any of the notes at maturity. A short time before the last note became due the mortgagor absconded, leaving the horses on a farm he had rented of D, whereupon the latter took the horses to his barn, and went to B, the agent of the mortgagee, and told him he had the horses there for him, and intended they should go to the mortgagee: *Held*, this was sufficient to constitute D the agent of B to keep the horses for him; at any rate, was sufficient to show that D was, under the circumstances, in the lawful possession of the property, and with the consent and approval of B, as agent of the mortgagee. *Upton et al. v. Craig*, 257.

INSURANCE OF MORTGAGED PREMISES.

15. *Insurance by the mortgagor for the benefit of the mortgagee.* See **INSURANCE**, 3, 4.

MOTION.**TO VACATE JUDGMENT OF FORMER TERM.**

1. A judgment of the circuit court can not be vacated for alleged error therein, upon motion entered in the same court at a subsequent term. *Knox et al. v. The Winsted Savings Bank*, 330.

MUNICIPAL CORPORATIONS. See **CORPORATIONS**, 4 to 10.**NAMES.****MIDDLE INITIAL LETTER.**

No part of the name. See **ABATEMENT**, 3.

NEGLIGENCE.**IN THE USE OF ONE'S OWN PREMISES.**

1. *Degree of care required to prevent injury to others.* The occupant of a building is not bound to insure the safety of persons who may come upon the premises. He is held to the use, not of the utmost, but only reasonable care and caution under the circumstances, to prevent others from receiving harm. *Murray et al. v. McLean, Adm'r*, 378.

2. In an action under the statute to recover for the death of a person, occasioned by the alleged negligence of the defendants, it appeared the defendants were large tobacco manufacturers, and in the building occupied by them, hogsheads of tobacco and other heavy material were carried from the first floor to the different floors above, by means of an elevator running through hatchways cut in each floor. These hatchways were situated some distance back from the front of the building, away from the office and out of the reach of persons having business to transact with the house, where no one except the inmates of the house and employees could be reasonably expected to go, and were

NEGLIGENCE. IN THE USE OF ONE'S OWN PREMISES. *Continued.*

surrounded, except when the elevator was in use, by railing from three to four feet high. The building was considered very good as to light, and in the basement, from four to six feet from the hatchway in the first floor, a gas jet was kept constantly burning. At the time of the accident, between nine and ten o'clock in the morning, the elevator was in use, carrying hogsheds of tobacco from the first to the fourth floor. Two men were engaged at the work. They would roll a hogshed on the elevator, get on with it, ride to the fourth floor, unload and descend. While the elevator was thus in use, the deceased fell through the hatchway in the first floor, receiving injuries from which he died. It appeared the deceased, who was a cooper, furnished the defendants with kegs for packing purposes, and was in the habit of bringing them in a wagon to the front door of the building to unload. The first that was known of him about the building on the morning of the accident, was from his cries in the cellar just under the hatchway, while the elevator was at the fourth story with a hogshed of tobacco. Immediately afterward his wagon was found at the door, with a load of kegs upon it. Keeping the mouth of the hatchway unguarded while the elevator was thus in use, was the only negligence imputable to the defendants: *Held*, while the defendants might have prevented the injury by the employment of an additional force, so as to have kept a guard stationed at the hatchway for the express purpose of protecting persons from injury by falling into it, the law imposed no such burden upon men's conduct of their ordinary private business upon their own premises. *Murray et al. v. McLeun, Adm'x*, 378.

8. But had the hatchway been at a place where persons were accustomed to pass and repass, or to be about, and their presence there ought to have been reasonably anticipated, a higher degree of care might have been exacted of the defendants. *Ibid.* 378.

NEGLIGENCE IN RAILROADS.

4. *Killing stock.* Where stock is killed on a railroad track, and the engineer in charge at the time could, by the use of ordinary care and skill, without danger, have stopped the train in time to avoid the collision, although the animals were wrongfully upon the track, the company is nevertheless liable. *Toledo, Peoria & Warsaw Railway Co. v. Bray*, 514.

5. *Keeping bridges over highways in safe condition.* In an action against a railroad company to recover for injuries to the plaintiff, occasioned by his falling through an uncovered bridge in attempting to get on the defendants' train, the bridge being under the control of the defendants, it appeared the bridge at which the injury occurred was thirty or forty feet long and sixteen feet high, was in the limits of a city, and over a public street in the immediate vicinity of the railroad. It had been covered by the defendants, but was uncovered at the time of the accident, for repairs, and the plaintiff, in attempting to get upon

NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

the cars at the hour of midnight, fell through the bridge: *Held*, an instruction which told the jury "that the defendants were not bound to cover and keep covered the bridge or track over the road or sidewalk where the injury was caused," was properly refused, and that it was the duty of the company to have the bridge covered or so protected, if uncovered for repairs, as to prevent such injuries. *Chicago & Northwestern Railway Co. v. Fillmore*, 265.

6. *Care and diligence required, generally.* Railroad companies, in the enjoyment of their franchises and in the performance of their duties, should have a proper regard to the safety of persons whom they invite to their depots. They should omit no act, the omission of which would endanger the limbs or lives of those who seek to ride upon their trains. *Ibid.* 265.

TOWNSHIPS—NEGLECT OF HIGHWAYS.

7. *Whether liable therefor.* See HIGHWAYS, 9.

AS A QUESTION OF LAW OR FACT.

8. *Who may determine what facts constitute negligence.* See INSTRUCTIONS, 2.

NEW TRIALS.

AT WHAT TERM THEY MAY BE GRANTED.

1. When a trial was had at one term of court, and a motion was entered for a new trial, and the motion was continued until the next term, when it was withdrawn, and the other party entered a similar motion, and a new trial was granted: *Held*, it was not error, as the record was still before the court, and the granting of a new trial is a matter of discretion. *Constantine v. Foster*, 36.

2. In such a case, the 24th section of the Practice Act has no application, as it applies to setting aside verdicts and judgments for irregularities, and requires that to be done at the term of court at which the judgment or verdict was rendered; but the same section provides that new trials may be granted before final judgment. *Ibid.* 36.

VERDICT AGAINST THE EVIDENCE.

3. Even where the evidence is conflicting, if it preponderates strongly in favor of defendant, a verdict against him should be set aside and a new trial granted, and if refused, the judgment will be reversed for that error. *Chicago, Rock Island & Pacific Railway Co. v. Herring*, 59.

4. In this case, the verdict of the jury being manifestly against the weight of the evidence, the judgment is for that reason reversed. *Columbus, Chicago & Indiana Central Railway Co. v. Troesch*, 155.

EXCESSIVE DAMAGES.

5. *For injuries on a railroad.* In an action against a railroad company to recover for injuries occasioned by the alleged negligence of

NEW TRIALS. EXCESSIVE DAMAGES. *Continued.*

the defendants, it appeared the injuries to the plaintiff were of a serious and permanent character, rendering him a cripple for life; that he suffered great pain and anguish, and was involved in a large expenditure of money, but the evidence failed to disclose any wantonness or wilfulness on the part of the defendants: *Held*, a verdict for \$25,000 was grossly excessive. *Chicago & Northwestern Railway Co. v. Fillmore*, 265.

6. *For breach of promise to marry.* In an action for a breach of promise of marriage, where the evidence showed the defendant to be worth \$7000, it was regarded that while a verdict for the plaintiff of \$1500 might be considered full if not large compensation, yet it was not beyond the discretionary power of the jury. In actions of that character, which sound in damages, the jury necessarily have a wide latitude in fixing the amount. *Sulzer v. Yott*, 164.

NEWLY DISCOVERED EVIDENCE.

7. A new trial will seldom be granted to let in newly discovered cumulative evidence, and then only when it seems to be decisive in its nature. *Ibid.* 164.

NEW TRIAL AT LAW.

When granted in chancery. See CHANCERY, 26 to 30.

NOTICE.

WHEN A PARTY IS CHARGEABLE WITH NOTICE.

1. Where a party wilfully closes his eyes against the lights to which his attention has been directed, and which, if followed, would have led to a knowledge of all the facts, he will be chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence. *Babcock et al. v. Lisk*, 327.

PURCHASER FROM MORTGAGOR.

2. *How far chargeable with notice.* Where a mortgage was given to secure a promissory note described therein, and also \$500, of other indebtedness not evidenced by any writing outside of the mortgage itself, the fact that the sum of "five hundred dollars" was named in the mortgage, was, of itself, sufficient to put a subsequent purchaser of the mortgaged premises on inquiry as to what was the true amount due under the mortgage, and if he purchased without making the necessary inquiries at the proper sources of information, he would be held to have done so at his peril. The mortgage being duly recorded in the proper office, a purchaser of the premises would be chargeable with notice of all it contained. *Ibid.* 327.

NOTICE BY POSSESSION.

3. *Of notice to subsequent purchaser.* A party in possession of lands claiming to have a contract with the owner for the purchase of the

NOTICE. NOTICE BY POSSESSION. *Continued.*

same, filed a bill to compel a conveyance to him, a subsequent purchaser being made a party defendant: *Held*, the possession of complainant could only charge the subsequent purchaser with notice of the facts as they existed; and there being no actual purchase by the complainant, his possession being unauthorized, the relief sought was denied. *Davidson v. Porter et al.* 800.

IN STATUTORY PROCEEDINGS.

4. *Notice must be made to appear.* Where a court is called upon to exercise a power specially bestowed upon it by statute, not within its ordinary common law or chancery powers and jurisdiction, the fact that the notice prescribed in the statute was given, it being a jurisdictional fact, must appear on the face of the proceedings. *Donlin v. Hottinger et al.* 348.

5. *Recital thereof in decree.* That fact, however, may be made to appear from a proper recital thereof in the order or decree, which will be sufficient in a collateral proceeding, if there be nothing in the case to show that the finding of the court was not correct. *Ibid.* 348.

NOTICE OF SALE ON EXECUTION.

6. *Who may avail of defects therein.* See EXECUTION, 5.

OF AMENDMENT OF OFFICER'S RETURN.

7. *Whether notice of the application should be given.* See AMENDMENTS, 1.

NOTICE TO SURETY.

8. *Of default of his principal—whether necessary.* See SURETY, 3.

OF DISSOLUTION OF PARTNERSHIP. See PARTNERSHIP, 9.

ADJOURNMENT OF ADMINISTRATOR'S SALE.

Omission to re-advertise—its effect upon the validity of the sale. See ADMINISTRATION OF ESTATES, 5.

WHAT CONSTITUTES NOTICE.

To subsequent purchaser, as to existence of a right of way. See PURCHASERS, 2.

IN PROCEEDINGS TO ACQUIRE RIGHT OF WAY.

Under act of 1859—of the various notices required. See RIGHT OF WAY, 2, 3, 4.

OFFICER.

FALSELY ASSUMING TO BE AN OFFICER. See CRIMINAL LAW, 1.

RIGHT OF ENTRY INTO THE HOUSE OF ANOTHER.

To execute a writ. See TRESPASS, 7.

FRAUDULENT LEVY OF ATTACHMENT.

Where officer takes property out of his jurisdiction. See PROCESS, 6.

PAROL EVIDENCE. See EVIDENCE, 1 to 6.

PARTIES.

IN CHANCERY.

1. Where a part of the members of an incorporated company form a partnership between themselves for the purpose of carrying on the business of the company, under a lease, upon bill filed by one of the partners for a dissolution, and a settlement of the partnership affairs, the corporation is neither a necessary nor a proper party. *Faulds v. Yates et al.* 416.

ON BILL TO REDEEM.

2. Where the holder of the legal title to land, holds the same as trustee, and seeks, by bill in chancery, to redeem for others from a sale under a prior mortgage, he should make them co-complainants, and have all persons in interest before the court. *Beach v. Shaw*, 17.

POSTHUMOUS HEIRS.

3. A posthumous child can not be divested of its title to land inherited by it, by a proceeding in a court, unless made a party; nor will the form of action, whether in chancery, at law or under the statute, make the slightest difference. A person must have an opportunity of being heard before a court can deprive him of his rights, and this rule applies equally to superior and inferior jurisdictions. Such a person, not having been made a party to the bill, his rights are not cut off by the decree, the sale or the administrator's deed, and he can recover from those claiming his title. *Botsford v. O'Conner et al.* 72.

IN SUIT UPON INSURANCE POLICY.

Where a mortgagor insures for the benefit of his mortgagees. See INSURANCE, 3, 4.

TO COMPEL THE OPENING OF A HIGHWAY.

Who may apply for mandamus therefor. See MANDAMUS, 2.

ADMINISTRATOR'S SALE OF LAND.

Where all the heirs are not parties to the proceeding—effect of the omission. See ADMINISTRATION OF ESTATES, 1.

SALE BY AGENT OF TRUSTEE.

Who may question it. See TRUSTS AND TRUSTEES, 10.

PARTNERSHIP.

OF REAL ESTATE.

1. Real estate belonging to a partnership will, in equity, be treated like its personal funds, and distributed accordingly. If the title stands in the name of one of the partners, he will be held as a trustee of the partnership, and be made to account to the other partners according to their several rights and interests. *Faulds v. Yates et al.* 416.

2. So where one of three partners purchased real estate for the partnership, each contributing his proportion of the purchase money,

PARTNERSHIP. OF REAL ESTATE. *Continued.*

but the purchasing partner took the title in his own name, upon a dissolution of the partnership, and a settlement of its affairs, in chancery, it was held proper to compel the partner holding the title to convey to each of the others his proportionate interest. *Faulds v. Yates et al.* 416.

3. *Where the purchasing partner has received an undue proportion of the purchase price.* And where the partner who made the purchase, represented to his co-partners the purchase price he had agreed to pay to be greater than was the fact, and they agreed to pay, and did pay, their proportion according to such false representation, yet upon seeking to compel a conveyance, in equity, the partners so contributing more than their proper share, would not be entitled to be reimbursed for that excess. Where a conveyance of land is asked, it must be granted upon the specific terms of the agreement. *Ibid.* 416.

POWER OF THE SEVERAL PARTNERS.

4. *To give promissory notes in the name of the firm.* While, in the case of commercial partnerships, each partner may execute promissory notes and other negotiable securities, in the name of the firm, or do any other acts which are incident or appropriate to such trade or business, according to the common course and usages thereof, yet where the partnership is organized for farming purposes, the partners do not, as incident thereto, possess a power to draw or accept bills, or to draw or endorse notes for the firm. In such cases there must be some proof that an express authority is given for this purpose, or that it is implied by the usages of the business, or the ordinary exigencies and objects thereof. *Ulery v. Ginrich*, 581.

CONTRACTS AFTER DISSOLUTION.

5. *By one partner—notice of dissolution.* As a general rule, after a dissolution of a partnership neither partner can make a new contract in the firm name binding on the others, without express authority, and no note, draft or acceptance so executed in the name of the firm will be valid if the party with whom the contract is made had notice of the dissolution. *Easter v. The Farmers' National Bank of Salem*, 215.

6. *Parol authority sufficient.* Written authority, to authorize one of the partners to use the firm name after the partnership is dissolved, so as to be binding on all, is not required—it may be given by parol. And there are cases which go to the extent of holding that such authority may be inferred from the acts of the parties. *Ibid.* 215.

7. *Evidence of such authority.* In a suit on a promissory note, executed by one partner, in the firm name, after the dissolution of the firm, it was held, the mere fact that the other partners had for some reason paid certain other notes executed by him in the firm name after the dissolution, did not of itself furnish sufficient evidence of authority in such partner to execute the note in question. *Ibid.* 215.

PARTNERSHIP. CONTRACTS AFTER DISSOLUTION. *Continued.*
8. *Unauthorized use of firm name after dissolution—ratification of.*

Where one partner, after the dissolution of the partnership, uses the firm name without authority, his act may be subsequently ratified by the others, and the contract will be as binding on them as though their consent had been previously given for that purpose. *Easter v. Farmers' National Bank of Salem*, 215.

NOTICE OF DISSOLUTION.

9. *What constitutes.* Where the president of a bank had knowledge of the dissolution of a partnership: *Held*, that notice to him constituted notice to the bank. *Ibid.* 215.

PASSENGERS.

EJECTING PASSENGERS FROM RAILWAY CAR. See **RAILROADS**, 3, 4.

PAYMENT.**BY MEANS OF OTHER SECURITIES.**

1. If the principal obligor in a bond, after a breach thereof, executes his promissory note, and it is received in actual payment of the subject matter of such breach, that will operate as a discharge of the liability on the bond. *Hough v. Aetna Life Insurance Co.* 818.

WHAT CONSTITUTES A PAYMENT.

2. *Instead of a redemption.* See **MORTGAGES**, 7, 8.

PLEADING.**OF THE DECLARATION.**

1. *In an action on the case for wrongfully suing out an attachment against the goods of the plaintiff, the declaration averred that the money claimed in the attachment was paid to save the property from total ruin: Held*, the payment of the money having released the property from the levy and ended the suit, this was equivalent to an averment of a termination of the proceeding in attachment. The omission of such an averment is, however, cured by verdict. *Spaids v. Barrett et al.* 289.

2. While the averment of the want of probable cause is of the gist of such action, still the words "without any reasonable or probable cause" are not indispensable. Language may be used having the same meaning, and if this necessary averment of the want of probable cause is included in the sense of the declaration, that is sufficient. Ibid. 289.

3. Where the declaration averred, substantially, that the defendants, wickedly and maliciously intending to injure and ruin the plaintiff, and extort money from him, procured the making of an affidavit and the issuance of a writ of attachment, and that they knew the statements in

PLEADING. OF THE DECLARATION. *Continued.*

the affidavit were false, it was *held*, upon the question as to the sufficiency of the declaration, on motion in arrest of judgment, such averments negatived the existence of probable cause, and were equivalent to the positive assertion of a want of probable cause. *Spaids v. Barrett et al.* 289.

IN ACTION FOR FALSE IMPRISONMENT.

4. *Plea justifying the arrest—its requisites.* Where a plea justifies an imprisonment under an order of the county court, but the defendant admits that, as the attorney of a creditor of the estate, he procured the arrest and imprisonment, and attempts to set up in his plea the facts upon which the arrest and committal were made, the plea should show all the facts necessary to give the court jurisdiction, and such a compliance with the statute as justified the county court in issuing the attachment and ordering the committal. *Von Kettler et al. v. Johnson*, 109.

5. A party, who pleads as a defense the order of a court of limited jurisdiction, and professes to set up the facts, must state such facts as show the court to have had jurisdiction of the subject matter and of the person of the parties. *Ibid.* 109.

6. Where the arrest complained of was claimed to have been under a writ of attachment issued by a county court, the plea is defective, unless it shows that a writ of attachment was actually issued; a recital of an order for an attachment, is not sufficient. Where a party seeks to justify under a judicial writ, it should be set out in the plea in full, or by apt and proper description. *Ibid.* 109.

7. *Setting up the statute to show authority to imprison.* Where a plea attempts to show a compliance with the statute authorizing the imprisonment of an administrator for refusing to pay money to a creditor, when ordered, all the facts necessary to warrant the imprisonment should appear. To authorize the court to order the imprisonment of the administrator, it must first ascertain the amount of money in the hands of the administrator, belonging to the estate, and the amount of debts allowed against the estate, and, if sufficient, order the payment of the debts in full, and a plea of this character will be defective unless this is averred. *Ibid.* 109.

8. The averment that the only debt against the estate is that of the creditor whom the court ordered to be paid, and that the administrator had in his hands assets to a much larger amount, is not sufficient, as it does not appear whether the assets consisted of money, property or choses in action. *Ibid.* 109.

9. When the court made the order of payment to the creditor, he should have demanded payment of the administrator, and if not paid within thirty days from that time, then, and not till then, could the creditor move for an attachment; this seems to be a jurisdictional fact, and should be clearly averred. *Ibid.* 109.

PLEADING. IN ACTION FOR FALSE IMPRISONMENT. Continued.

10. *Alleging jurisdictional facts, generally, as to the action of a court of general, or only inferior, jurisdiction.* To avail of such a defense, it seems that, as the probate court is of a limited, but not inferior, jurisdiction, such a plea of justification need not set up the facts showing jurisdiction, but generally to have averred that the plaintiff was arrested and imprisoned by the sheriff, by virtue of a writ of attachment issued from the county court, on an order, lawfully made, when the presumption would have arisen that the court had jurisdiction to make the order and issue the attachment. It is a court of record, and has a general jurisdiction, of unlimited extent, over a class of subjects, and when acting in reference to them, the jurisdiction is as general as that of the circuit court, and as liberal intendments will be made in favor of its jurisdiction. *Von Kettler et al. v. Johnson*, 109.

CARRYING DEMURRER BACK.

11. A bad plea can not be aided by reference to the declaration. A demurrer to a bad replication will be carried over it and sustained to a bad plea, as a demurrer is generally carried back and sustained to the first defect in the pleadings. *Illinois Fire Insurance Co. v. Stanton*, 354.

WAIVER OF FORMAL PLEADINGS.

Admissibility of evidence. See PLEADING AND EVIDENCE, 18.

USURY MUST BE SPECIALLY PLEADED. See PLEADING AND EVIDENCE, 15.

PLEADING AND EVIDENCE.**ALLEGATIONS AND PROOFS.**

1. An averment in a declaration, that defendant agreed to pay plaintiff five per cent on the amount for which he should sell a mill of defendant, whatever it might amount to, is not sustained by evidence that defendant agreed to pay plaintiff five per cent, if he would sell the mill for \$5000. In this there is a fatal variance between the contract declared upon and that proved. *Menifee v. Higgins*, 50.

2. Where the holder of the legal title to land holds it as trustee, and he claims the right to redeem and set aside sales in the way of his title, he should frame his bill with that view, and not claim by his bill to do so in his own right and for his own benefit. Having claimed in the bill relief for his own benefit, he can not urge that the proceedings are for the benefit of others. Relief must be granted according to the frame and prayer of the bill, and seeking to redeem for others, he should make them co-complainants, and have all persons in interest before the court. In such a case, the mortgagor, his assignee or the creditors through the trustees, are the only persons who can claim the right to redeem, and they are not seeking the right in this case. Until they complain the court will not decree a redemption or set aside the

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOFS. *Continued.*

sale, at the solicitation of a person having no equitable rights. *Beach v. Shaw*, 17.

3. Where the declaration in an action against a city for having so graded a street as to cause water to run therefrom into plaintiff's building averred that water from the street ran into plaintiff's building, and the evidence showed the water ran from the street over a space of a few feet before entering the building, there was no variance. *City of Aurora v. Reid et al.* 29.

4. *Plea of former recovery—variance.* A plea of former recovery is not sustained by the record of a judgment on an agreement of a different date, nor is such evidence admissible, because of the variance. Nor can the record of a judgment on an agreement entered into in 1864, be read in evidence, under a plea of former recovery, to an action on contracts entered into in 1863 and 1866. This proof is variant and does not sustain the plea. *Miller et al. v. McMannis*, 126.

5. *Variance—under plea of usury.* Where a plea of usury averred the payment of one hundred and fifty dollars to procure forbearance, and the evidence showed but one hundred and twenty-five dollars thus paid: *Held*, there was such a variance as to exclude the evidence. The defense of usury being penal in its nature the proof must be strict to sustain the defense. *Frank et al. v. Morris*, 138.

IN ACTION FOR SLANDER.

6. *Under plea of justification.* In an action for slander, for charging the plaintiff with having committed fornication, and the plea of justification averred that plaintiff had been guilty of fornication, without averring any time, it was error in the court to restrict the proof of her having committed fornication to two years before the words were spoken by defendant. The plea not being limited as to time, the proof should not have been. Proof of the truth of the plea, without reference to when the act was committed, was pertinent to the issue, and should have been admitted. *Stowell v. Beagle*, 97.

7. It was improper to admit evidence of the fact that there was a prior personal difficulty between defendant and the father of plaintiff, as it did not tend to prove actual malice against the plaintiff, and was not pertinent to the issue. *Ibid.* 97.

8. Where the plea of justification set up the fact that the plaintiff had been guilty of fornication, it was error to instruct the jury that to maintain the plea the defendant must prove the words charged were true, on the grounds that plaintiff, although an unmarried woman, was guilty of fornication, and had been delivered of a child, and it was necessary that such alleged facts, constituting the justification, should be proved by clear and satisfactory evidence, and if not so proved, the defense would fail. Nothing being in the plea in regard to the plaintiff having been delivered of a child, the instruction was too broad,

PLEADING AND EVIDENCE. IN ACTION FOR SLANDER. *Continued.*

and should not have been given. Such an instruction was well calculated to mislead the jury. *Stowell v. Beagle*, 97.

EVIDENCE IN REPLEVIN.

9. *Under plea of property in the defendant, or a stranger.* The averment in a plea in a replevin suit, of property in the defendant, being but inducement to a traverse of the averment in the declaration of property in the plaintiff, and such plea having put plaintiff to the proof of property in himself, any evidence which tends to show the plaintiff is not the owner is legitimate, and it is error to reject it on the trial of the issue. *Constantine v. Foster*, 36.

10. The 14th section of the Practice Act (R. S. 1845) does not change the rules of pleading in the action of replevin, so as to require a plea of property in a stranger, before such proof can be made, where the ownership of the plaintiff is traversed. *Ibid.* 36.

11. When the averment in the declaration, of ownership by the plaintiff is traversed, he is put on proof of title against the world, and he must prove title to recover; in a plea of property in the defendant, or a stranger, traversing plaintiff's ownership, the only issuable fact in the plea is the plaintiff's ownership, and he must recover on his title, and the burden of proof is on him. *Ibid.* 36.

12. Under such an issue it is error to prevent the defendant from proving property in a third person. It is pertinent to the issue, and tends to prove the plaintiff was not the owner. *Ibid.* 36.

13. *Under plea of non detinet.* And even under the plea of *non detinet*, it is competent for the defendant to prove that the plaintiff is not entitled to possession of the property. *Ibid.* 36.

RECOVERY ON THE COMMON COUNTS.

14. Where a common count alleged an indebtedness of five hundred dollars for commissions on the sale of land and mill, such a count is not sustained by evidence of an exchange of the mill and land for other property. Had the special agreement been fully performed, and had nothing remained to be done but to pay the money due on the agreement, then a recovery might have been had under the common count, but plaintiff having failed to perform his part of the agreement, he can not recover. *Meniffee v. Higgins*, 50.

EVIDENCE UNDER THE GENERAL ISSUE.

15. *Of usury.* As usury rendered the contract void at the common law, it could be proved under the plea of non assumpsit, like any other defense which showed the contract void, released or discharged. But under our statute the creditor only forfeits the entire interest, and hence the defense does not render the contract void or defeat a recovery of the principal, and the reason for allowing the defense under the plea of non assumpsit does not apply, and the defense of usury must be made by special plea, under our statute. *Frank et al. v. Morris*, 138.

PLEADING AND EVIDENCE. *Continued.***PROOF OF EXECUTION OF INSTRUMENT.**

16. *Under what state of pleading required, before justices of the peace.* Although not strictly formal, a plea of non-assumpsit, sworn to, and not objected to by the plaintiff, will put in issue the execution of a promissory note, in a justice's court. *Glazier v. Streamer*, 91.

17. On an appeal to the circuit court in such a case, it is error to admit a note in evidence, when its execution is thus denied, without proof that it was executed by the defendant. *Ibid.* 91.

WAIVER OF FORMAL PLEADINGS.

18. *Admissibility of evidence.* Where the parties at the trial in the court below stipulated that either party might offer any legal evidence as to the actual state of accounts between them, on issues of fact made up in the cause, so as to have a trial on the merits, without reference to questions as to the form of such pleadings, or form of action, or defense: *Held*, that it waived the demurrer to a portion of the pleas and dispensed with the necessity of having issues of fact formed on them. On the trial under this stipulation the court could admit all evidence that could have been under formal and well drawn pleas, and the court was not governed by the pleas on file. *Miller et al. v. McManis*, 126.

POSSESSION.**NOTICE BY POSSESSION.**

Notice to subsequent purchasers. See NOTICE, 2.

POSTHUMOUS HEIR. See DESCENTS, 1.**POWERS OF MUNICIPAL CORPORATIONS.****OF A NEW POWER GIVEN BY STATUTE.**

Manner of its execution. See CORPORATIONS, 5.

PRACTICE.**TIME OF MAKING CERTAIN OBJECTIONS.**

1. *As to jurisdiction of a court of chancery.* It is too late to raise the objection, for the first time, in the appellate court, whether a court of chancery has jurisdiction to enjoin a city collector from selling personal property in satisfaction of a special assessment, that character of property not being subject to that purpose. *Mia v. Ross et al.* 121.

OF OBJECTIONS WHICH MUST BE SPECIFIC.

2. In the matter of a special assessment in the city of Chicago, on the application for judgment it was objected, that the schedule containing the statement of the unpaid assessments and the list of lands, was not signed by the collector, nor corporeally annexed to the report in which it was referred to, so as to identify it: *Held*, the objection,
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PRACTICE. OF OBJECTIONS WHICH MUST BE SPECIFIC. *Continued.*

if it be one at all, could have been obviated on the trial, and, therefore, the ground thereof should have been specifically stated. *Smith et al. v. City of Chicago*, 497.

OPENING AND CLOSING THE ARGUMENT.

3. *Who entitled to it.* An affirmative plea throws the burden of proof on the defendant, and, if the sole issue be upon such a plea, under the practice in this State, he will have the right to open and close to the jury. *Kells et al. v. Davis*, 261.

4. *Effect of error in respect thereto.* But so slight an error in practice as that the counsel of a party entitled, under the pleadings, to open and close the argument to the jury, was denied that privilege by the court, ought not to be a ground for the reversal of a judgment rendered in a judicial proceeding in all other respects regular, and that does justice between the parties. *Ibid.* 261.

MOTION TO EXCLUDE TESTIMONY.

What is embraced therein. See EVIDENCE, 12.

JURY SHOULD FIND THE FACTS.

Not the court. See JURY, 2.

GRANTING NEW TRIALS.

At what term. See NEW TRIALS, 1, 2.

PRACTICE IN THE SUPERIOR COURT OF CHICAGO.**AFFIDAVIT OF MERITS.**

1. *Its sufficiency.* Where a plea of usury in a suit in the Superior Court of Chicago, averred that defendant had paid \$150 for forbearance in the payment of \$3850, for seventy-five days, and the affidavit of merits required by a rule of that court stated that the note sued on was given for the balance due on another note and that defendant paid \$125 for forbearance in the payment of such balance for seventy-eight days: *Held*, that the affidavit of merits was insufficient, inasmuch as the defense it disclosed could not be given in evidence under the plea of usury. *Frank et al. v. Morris*, 138.

PRACTICE IN THE SUPREME COURT.**ERROR WILL NOT ALWAYS REVERSE.**

1. *Of improper instructions.* Although an instruction may not be properly limited, still if it is not calculated to mislead, that is not ground for reversal. *Chicago, Rock Island and Pacific Railway Co. v. Herring*, 59.

2. *In respect to the opening and conclusion of the argument in a cause.* See PRACTICE, 4.

PRACTICE IN THE SUPREME COURT. *Continued.***WHAT MAY BE REVIEWED ON ERROR.**

3. *Whether the exercise of discretionary power will be reviewed in an appellate court.* While, as a general rule, this court will not review the action of the lower courts in matters of discretion, still, cases may arise in which there has been such a state of facts as to call upon this court to interpose, to promote justice, by reviewing the decision of the circuit court, even in the exercise of discretionary power. *Mason v. McNamara et al.* 274.

4. *Of setting aside defaults.* Notwithstanding it is a matter of discretion in the circuit court whether a default should be set aside, cases may arise in which the exercise of such discretion will be reviewed by an appellate court. *Ibid.* 274.

PRESUMPTIONS.**OF LAW AND FACT.**

1. *As to proper service of process—presumption, where the decree finds there was service, and where it omits to do so.* See **PROCESS**, 1, 3.

2. *As to who served a writ.* See **PROCESS**, 10.

3. *Presumption of acquiescence in irregularities in sale under execution, by lapse of time.* See **LIMITATIONS**, 1.

4. *Destruction of evidence by a party—presumption that it was against him.* See **EVIDENCE**, 15.

5. *In favor of jurisdiction of county court.* See **PLEADING**, 10.

6. *Presumption as to whether a levy of taxes is excessive, made by the Auditor under act of April 16, 1869, to pay interest on bonds of municipal corporations.* See **TAXATION**, 9.

PRINCIPAL AND AGENT. See **AGENCY**.

PRIVILEGED STATEMENTS.

IN LEGAL PROCEEDINGS. See **SLANDER**, 1.

PROCESS.**PROCESS DIRECTED TO CORONER.**

1. *Presumption.* Where an execution is directed to the coroner, it will be presumed, in the absence of proof to the contrary, that the clerk properly so directed it. *Cook v. City of Chicago et al.* 268.

FINDING IN THE DECREE.

2. *How far conclusive.* When the court, by the decree, finds there was service, that, like any other finding of the court, can never be contradicted in a collateral proceeding, by parol, or other evidence outside of the record in that proceeding. It, however, may be by other portions of the same record. But such a finding is conclusive in a collateral proceeding, unless thus rebutted. *Botsford v. O'Conner et al.* 72.

PROCESS. FINDING IN THE DECREE. *Continued.*

8. The return in this case appeared in the record, and is defective in not showing how it was made, and as parol evidence could not be received to aid it, it can not be presumed the court acted on other evidence than the return, and it rebuts the finding of the court that there was service. *Botsford v. O'Conner et al.* 72.

WHERE THE DECREE DOES NOT FIND SERVICE.

4. *Presumption.* Where a court of general jurisdiction has proceeded to adjudicate in a cause, it will be presumed that the court had evidence that there was such service or appearance as conferred jurisdiction of the person. The question is primary, and must be first determined, but the presumption may be rebutted. If the same record shows insufficient service, and it fails to show the court otherwise acquired jurisdiction, then the presumption is rebutted, and it will be held the court acted on insufficient service. When the return appears in the record, and there is no finding of the court, from which it may be inferred that the court otherwise acquired jurisdiction, it will be held the court acted on the service appearing in the record. *Ibid.* 72.

INSUFFICIENT SERVICE.

5. *Parol evidence.* Where service of summons is insufficient to confer jurisdiction, the decree as to the defendants is a nullity, and may be questioned in a collateral proceeding. Where service is by summons, parol evidence will not be heard to prove or to aid it. It is otherwise, when the service is by publication. *Ibid.* 72.

FRAUDULENT LEVY OF ATTACHMENT.

6. *Officer taking goods out of his jurisdiction.* Certain horses were held by D, as the agent of a mortgagee of the property, and while the horses were so in the custody of D, he residing in Knox county, a subsequent creditor of the mortgagor having sued out, in Peoria county, a writ of attachment against his property, and placed the same in the hands of a constable, the latter went to D's house, and, in his absence, inquired of his boy whether the mortgagor left any property, and on being informed that he had, asked him if his father had any claim upon it. The boy replied in the negative. Thereupon the constable went to the barn, untied the horses and took them to Elmwood, in Peoria county, and there served the attachment upon them: *Held*, in an action of replevin by the mortgagee to recover possession of the horses, the constable in so taking possession of them could be regarded in no other light than as a trespasser, and could not be allowed to justify his act under the writ of attachment thus levied within his jurisdiction. *Upton et al. v. Craig*, 257.

RETURN OF SERVICE.

7. *In chancery.* The sheriff indorsed on a summons in chancery this return: "Served this writ on the within named Mary O'Conner

PROCESS. RETURN OF SERVICE. *Continued.*

and Charles R. O'Conner, the others not found in my county, the 26th day of August, 1858:" *Held*, the return of service insufficient to confer jurisdiction of the persons of the defendants. *Botsford v. O'Conner et al.* 72.

8. The return of service must show it was served by copy, in chancery, or by reading, at law; it must show the time, the manner and upon whom served, and for the want of these particulars the court will fail to acquire jurisdiction. There must be a legal service, and it must appear from the return that it is such service as gives the court jurisdiction over the person of the defendant. *Ibid.* 72.

OFFICER'S RETURN ON EXECUTION.

9. *As to description of land sold—whether sufficient.* Where a party claimed title to land by purchase at a sale thereof under execution, upon objection that the officer's return upon the execution, and the certificate of sale and the deed were inconsistent and contradictory; that the return described the land as being in township 39, and the certificate and deed as in township 38, the officer, in the first part of his return, stating that he levied on the land describing it as in township 38; that he had "caused the said property to be appraised, as appears by the return of the appraisers, herewith returned and made part of my return," the return of the appraisers as also the warrant to them to make the appraisement, describing the land as situated in township 38, the officer, in his return, then stating that he sold "the said premises," describing them the same as in his statement of levy with the exception of naming the township as 39, instead of 38, the certificate of purchase made at the same time describing the township as 38, it was *held*, from the whole return there could be no doubt the land sold was in township 38, and calling it 39 in one part of the return was merely a false particular of description which did not vitiate. *Cook v. City of Chicago et al.* 268.

PRESUMPTION AS TO WHO SERVED A WRIT.

10. It will be presumed that the officer making a return served the writ or did what the return states was done. It can not be presumed when a deputy sheriff says in the return the service was made by him, that the writ was executed by his principal, or that the latter was present and cognizant of what was done, or the manner in which the service was actually made. *O'Conner et al. v. Wilson et al.* 226.

SENDING PROCESS TO A FOREIGN COUNTY.

Of a plea in abatement in respect thereto. See **ABATEMENT**, 1 to 7.

EXECUTION.

Whether it may issue after seven years. See **EXECUTION**, 3.

AMENDMENT OF OFFICER'S RETURN. See **AMENDMENTS**, 1 to 8.

PURCHASE MONEY.

WHETHER RECOVERABLE.

1. *After rescission.* A vendor can not rescind an executory contract for the sale of land, and afterwards proceed to collect the purchase money. *Ogden v. Larrabee, Adm'r*, 389.

PURCHASERS.

SUBSEQUENT PURCHASER WITH NOTICE.

1. *Can not declare a forfeiture of his vendor's prior contract.* See FORFEITURE.

2. *Right of way.* Where a party purchased a right of way, and received a written instrument to evidence the fact, and both sides of the way were fenced, and it was in constant use by him, for the purposes of a way, although the writing was not recorded, these facts constitute such notice to a subsequent purchaser as to prevent him from holding the right of way. *McCann et al. v. Day*, 101.

3. *Of improvements made by subsequent purchaser with notice.* If a subsequent purchaser, with knowledge of the prior equities of the first purchaser, make improvements on the premises, he will be regarded as having done so in his own wrong, and it will not avail him as against the prior purchaser, or those claiming under him. *Dart v. Hercules et al.* 446.

4. *Purchaser from mortgagor—how far chargeable with a notice of amount secured by the mortgage.* See NOTICE, 2.

TRUSTEE BUYING AT HIS OWN SALE.

5. *Not allowable.* See TRUSTS AND TRUSTEES, 2 to 8.

OF AN AGENT AS A PURCHASER.

6. *Of his right to question the regularity of a sale under a prior mortgage.* See MORTGAGES, 6.

RAILROADS.

CONNECTING BY SIDE TRACKS.

1. *Rights of individuals.* By the rules of the common law, railroad companies can not be compelled to permit individuals to connect side-tracks of their own, with the tracks of the companies, in order to enable the latter to carry grain to warehouses or elevators which have been erected off their lines of road. *The People ex rel. Spruance et al. v. Chicago & Northwestern Railway Co.* 436.

2. *Of a custom in that regard.* And where it is sought to compel a railroad company to permit such connection, upon the ground of an alleged custom among the companies whose lines concentrate at the place indicated, the custom must be made clearly to appear, and to have existed so long as to have the force of law. *Ibid.* 436.

RAILROADS. *Continued.*

EJECTING PASSENGER FROM A CAR.

3. *For refusing to pay fare.* Where a passenger went upon a train of cars, and offered a worthless piece of paper, claiming it to be a pass, and on being informed that it was not a pass, the passenger refused to pay fare or leave the train, the servants of the company had a right to remove such passenger from the train at a regular station, and they may use the necessary force for that purpose. *Chicago, Rock Island & Pacific Railway Co. v. Herring*, 59.

4. *Using unnecessary force.* If, in such a case, the employees of a railroad company use more force than is necessary, then the company would be liable to damages, and the question of the good faith of the passenger in believing she had a valid pass, is wholly immaterial in assessing damages. *Ibid.* 59.

NEGLIGENCE IN RAILROADS. See NEGLIGENCE, 4, 5, 6.

REDEMPTION.

REDEMPTION FROM PRIOR MORTGAGE.

Who may redeem. See MORTGAGES, 10, 11.

WHAT AMOUNTS TO A SATISFACTION.

Instead of a redemption. Same title, 7, 8.

TERMS OF REDEMPTION.

In redeeming, where there are several mortgages. Same title.

REGISTRY OF VOTERS. See ELECTIONS, 2.

REMEDIES.

MALICIOUSLY SUING OUT ATTACHMENT.

1. *Remedy therefor.* See CASE, 1.

GAMING CONTRACTS.

2. *Remedy in chancery to compel the surrender of a draft indorsed and delivered in payment of a loss in a gaming transaction.* See GAMING CONTRACTS, 2.

HIGHWAYS—TO COMPEL THE OPENING THEREOF.

3. *By mandamus.* See MANDAMUS, 3, 4.

TO VACATE JUDGMENT OF FORMER TERM.

4. *Not by motion.* See MOTION, 1.

WHERE A CONTRACT IS ASSIGNED.

5. *Of a contract for the manufacture of certain articles, and its assignment by the party who was to do the work—remedy of the assignee.* See CHANCERY, 1.

REPLEVIN.

BURDEN OF PROOF.

1. *When upon the plaintiff.* When the averment in the declaration, of ownership by the plaintiff is traversed, he is put on proof of title against the world, and he must prove title to recover; in a plea of property in the defendant, or a stranger, traversing plaintiff's ownership, the only issuable fact in the plea is the plaintiff's ownership, and he must recover on his title, and the burden of proof is on him. *Constantine v. Foster*, 38.

OF THE PLEADINGS AND EVIDENCE.

2. *Of competent evidence under plea traversing plaintiff's averment of title, and alleging property in defendant or a stranger.* See PLEADING AND EVIDENCE, 9 to 12.

3. *Of evidence under plea of non detinet.* Same title, 18.

RES ADJUDICATA. See FORMER RECOVERY.

RESCISSION OF CONTRACT.

BY THE PARTIES. See CONTRACTS, 4 to 10.

IN EQUITY. See CHANCERY, 10, 11, 14, 15, 16.

RESPONDEAT SUPERIOR.

RAILWAY COMPANIES AND THEIR EMPLOYEES.

When the former liable for the wilful acts of the latter. See MEASURE OF DAMAGES, 6.

RETURN UPON PROCESS. See PROCESS.

RIGHT OF WAY.

MODE OF PROCEDURE, UNDER LAW OF 1859

1. Where a corporation is organized under the general law of 1859, for constructing a plank, gravel or macadamized road or pike, that provision of the statute which declares "the directors may present a petition," is fully complied with when the petition is signed by the corporation by its attorney. In suits by corporations, the corporate name and not the name of the directors, is used. *Skinner et al. v. Lake View Avenue Co.* 151.

NOTICE—WHETHER NECESSARY.

2. *Where the parties appear.* The filing of the petition and the appearance of the parties dispensed with notice required to be given of the time and place of hearing. The presenting of the petition, properly describing the land, praying for the appointment of appraisers to assess damages, gave jurisdiction of the subject matter, and appearance, of that of the persons. After the parties appear, notice is wholly unnecessary. *Ibid.* 151.

RIGHT OF WAY. NOTICE—WHETHER NECESSARY. *Continued.*

3. *Of time and place of meeting to assess damages.* Where the statute requires the commissioners, in condemning land, to view it and hear evidence as to damages, it is held to be indispensable to their action that they give personal notice of the time and place of meeting to assess the damages, and a recital in their report that they had given notice is insufficient; it should appear in the report or the order approving the same. *Skinner et al. v. Lake View Avenue Co.* 151.

4. *Of time of filing report.* The record should show service of notice of the time of filing the report. Under the 18th section of the act, the court has the power to modify the assessment made by the appraisers, and for such purpose evidence may be heard, and the owner of the land should have notice, that he may be heard on the question. *Ibid.* 151.

OF THE WIDTH THEREOF.

5. *In what manner to be determined.* Upon an application by a railway company for the condemnation of a right of way, the company is not bound to take and pay for the land described in the petition, if less is needed for its purposes. It is not estopped by the allegations in the petition as to the quantity of land to be taken, when its engineer is of opinion that a less quantity is sufficient. *Peoria & Rock Island Railway Co. v. Bryant*, 478.

6. And especially is this the rule where the proceedings are had under the provisions of the act incorporating the Mississippi Railroad Company, under which the Peoria & Rock Island Railway Company was authorized to act in that regard. *Ibid.* 478.

7. So, upon an appeal from the action of the commissioners had under that act, to the circuit court, the report of the commissioners is the foundation of the appeal, and the width of land as therein described, must control. When the company acquiesces in the width adopted in the report, with knowledge of it, then it is concluded. *Ibid.* 478.

OF THE VERDICT.

8. *Its requisites.* On the trial of such appeal, under the act mentioned, it is not sufficient that the verdict is for a gross sum in damages; it should give the value of the land taken, also the amount of damages, and a description of the land taken, and the judgment should conform thereto. *Ibid.* 478.

MEASURE OF DAMAGES.

9. *What proper to be considered.* Where the owner of the land, over which it is sought to condemn the right of way, claims that he will thereby lose the beneficial enjoyment of a spring on the land, that is a proper subject for the consideration of the jury in adjusting the compensation. *Ibid.* 478.

RIGHT OF WAY. *Continued.*

BURDEN OF PROOF.

As to the title to the land. See EVIDENCE, 17.

SALES.

JUDICIAL SALES.

1. *Sale of land en masse under execution.* Although the execution is valid, and both the judgment and execution properly described the land, the irregularity in selling *en masse*, instead of in parcels, gives the defendant a right to have the sale set aside, and so with other irregularities, but the right may be lost by laches. *Winchell et al. v. Edwards et al.* 41.

2. *Leased premises—severing improvements from the land, by levy and sale on execution.* A house erected upon ground held under a lease, is annexed to and forms a part of the leasehold estate. The house is not, of itself, a separate chattel, but it, with the lease on the ground, forms a chattel real; and not being naturally divisible, it is not regular for the officer to sever the house from the term to which it is annexed. *Conklin et al. v. Foster*, 104.

3. A sheriff has no power to levy on and sell houses, timber or ornamental trees, and sever them from the fee. *Ibid.* 104.

4. *What is the subject of levy and sale under execution* See EXECUTION, 1, 2.

5. *Notice of sale on execution—who may avail of defects therein.* Same title, 5.

SATISFACTION.

WHAT AMOUNTS TO A SATISFACTION.

Instead of a redemption. See MORTGAGES, 7, 8.

SCHOOL TAX.

LEVIED FOR A SPECIFIC PURPOSE.

Can not be diverted therefrom. See TAXATION, 4, 5.

OF A SECOND ELECTION, TO BORROW MONEY.

Effect of a negative result on a prior vote to build a school house. See ELECTIONS, 1.

SET OFF.

AS BETWEEN VENDOR AND PURCHASER.

1. In an action on a promissory note by the payee against the maker, it appeared the note was given for the unpaid purchase money of a tract of land which the vendor had contracted, upon the payment of the note, to convey to the vendee, by deed of general warranty, but the deed was in fact executed before final payment was made, and in the mean time a portion of the land had been condemned, under the

SET OFF. AS BETWEEN VENDOR AND PURCHASER. *Continued.*

right of eminent domain, for a railway track: *Held*, the damages to the defendant, arising by reason of the incumbrance thus created on the land, could not be set off against the note. *Stevenson et al. v. Loehr*, 509.

SHERIFF'S DEED.**INSUFFICIENCY OF RETURN OF SALE.**

1. *Its effect.* In an action of ejectment, where the plaintiff claimed under a sheriff's sale, an objection that the sheriff's return upon the execution failed to show a sale, was overruled. It was only necessary for the plaintiff to produce the judgment and execution, to entitle his deed to be read in evidence. His title could not be defeated by the neglect of the sheriff to make a proper return. *Stribling et al. v. Prettyman*, 371.

SLANDER.**PRIVILEGED STATEMENTS.**

1. *In legal proceedings.* Whatever is said or written in a legal proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it. So, in an action on the case for wrongfully suing out an attachment, a count in the declaration, which was merely a count in slander, based upon an alleged libellous affidavit filed for the procurement of the writ, was *held* bad on demurrer. *Spaids v. Barrett et al.* 289.

EVIDENCE UNDER PLEA OF JUSTIFICATION.

2. *What properly admissible.* See PLEADING AND EVIDENCE, 6, 7, 8.

SPECIAL ASSESSMENTS.**IN THE CITY OF CHICAGO.**

1. *Validity of ordinance in that regard.* An ordinance providing for a special assessment for certain improvements in the City of Chicago, ordered that the improvements be made, excepting such portions thereof as had been already made in a suitable manner, the work to be done under the superintendence of the board of public works; but neither the ordinance nor any of the proceedings in any way defined what portion of the work had been before done in a suitable manner: *Held*, the ordinance was void. *Andrews v. City of Chicago*, 289.

2. *Necessity of the oath of the commissioners.* Upon an application for judgment upon a special assessment in the city of Chicago, it is admissible for the objectors to prove, under a proper objection filed to a recovery of the judgment, that the commissioners of the board of public works did not take the oath to faithfully execute their duties, as required by the statute. This provision of the statute being imperative, the omission of the commissioners to take the oath prescribed

SPECIAL ASSESSMENTS. IN THE CITY OF CHICAGO. *Continued.*

before proceeding to make the assessment, invalidates the proceeding. *Wheeler et al. v. City of Chicago*, 415.

3. *Meeting of the commissioners.* It is also a fatal objection to a recovery, that the commissioners did not, in fact, have any meeting at a public place, at the time designated in their notice of the assessment. *Ibid.* 415.

4. *Certificate of publication.* A certificate of publication of the notice of making a special assessment by the board of public works in the city of Chicago, or that of the application for confirmation thereof by the common council, is fatally defective if it fails to state the date of the first and last papers containing the notice, or something equivalent thereto. *Andrews v. City of Chicago*, 239; *Rue et al. v. City of Chicago*, 435.

5. The certificate of publication of the notice of making a special assessment in the city of Chicago, and of notice of application to the common council for the confirmation thereof, is fatally defective, if it omit to state the date of the last paper containing such notice, or language equivalent thereto. *Allen et al. v. City of Chicago*, 264.

6. The certificate of publication of the notice of an application for judgment upon a special assessment, did not state that it was published a certain number of days, "exclusive of Sundays and holidays," but certified that the notice had been published ten days consecutively, commencing with the 18th day of January, 1869: *Held*, the certificate was sufficient, as, from the language used, the court could ascertain the dates of the first and last papers containing the notice. *Griffin v. City of Chicago*, 317.

7. A certificate of publication of a notice of application for judgment upon a special assessment warrant in the city of Chicago, stated that the notice had been published ten days consecutively, commencing on a particular day: *Held*, there being no exception for holidays, the court could determine by computation the dates of the first and last papers containing the notice, and, therefore, the certificate was sufficient. *Smith et al. v. City of Chicago*, 497.

8. *Recording of the judgment, orders, etc., on the report.* The requirement in the charter of the city of Chicago, that in the matter of a special assessment, the judgment, orders, etc., must be recorded upon the report of the collector, even if considered to be mandatory, is in respect to something to be done after judgment, the omission of which could not affect the validity of the judgment itself, whatever might be its effect upon a sale under the judgment. *Smith et al. v. City of Chicago*, 497.

WHETHER COLLECTIBLE OUT OF PERSONAL PROPERTY.

9. *Construction of general revenue law, and act of March, 1, 1854, and of the charter of the city of Aurora.* Where a city charter provides that

SPECIAL ASSESSMENTS.**WHETHER COLLECTIBLE OUT OF PERSONAL PROPERTY.** *Continued.*

all taxes and assessments shall be a lien upon the real estate upon which they are imposed, and on personal estate from and after the delivery of the warrant for the collection thereof, until paid, and any personal property belonging to the debtor, may be taken and sold for payment of taxes on real estate, and all taxes and assessments, general and special, shall be collected by the collector, in the same manner and with the same powers as are given by law to collectors of State and county taxes: *Held*, that this provision only confers power on the collector to sell personal property for the payment of taxes; that taxes and assessments are a lien on real estate upon which they are imposed, and taxes are a lien on personal property. *Miz v. Ross et al.* 121.

10. Although the charter confers upon the city collector the same power to collect taxes and assessments as is possessed by collectors of State and county taxes, the general revenue laws expressly authorize the collection of such taxes from personal property and that real estate shall not be sold for taxes while there is personal property out of which it may be collected. And there being a plain distinction between a tax and an assessment, the one being a burden and the other an equivalent for the enhanced value of the property assessed, derived from the improvement: *Held*, that the general revenue law confers no power on the city collector, by the provision of the charter, to sell personal estate in satisfaction of any assessment. *Ibid.* 121.

11. The act of the 1st of March, 1854, prescribing the mode of selling real estate, for the non-payment of taxes and assessments, makes a distinction between taxes and assessments, by making them distinct subjects of two sections. *Ibid.* 121.

12. The charter having provided that on the non-payment of such assessments, the collector shall apply to the county court for judgment against the land, and that the court shall render judgment therefor and issue a precept to the sheriff to sell the land, makes it a proceeding *in rem*, and the only peril the owner incurs is the loss of his lot. *Ibid.* 121.

SPECIAL DEPOSIT.

LIABILITY OF BANKER THEREFOR. See **BANKER**, 1.

SPECIFIC PERFORMANCE. See **CHANCERY**, 17 to 20.

SPLITTING A CAUSE OF ACTION. See **ACTIONS**, 1.

STATUTES.**CONSTRUCTION OF STATUTES.**

1. *General rules.* In the construction of statutes, the intention of the legislature is always a proper subject of inquiry. The intention is

STATUTES. CONSTRUCTION OF STATUTES. *Continued.*

to be ascertained from the act itself and other acts *in pari materia*—all acts *in pari materia* are to be taken together as if they were one law—and this rule prevails even though some of the acts may have expired or been repealed. *Stribling et al. v. Prettyman*, 371.

STATUTES CONSTRUED.

2. *Taxation—time within which assessment must be returned, in case of assessments for corporate purposes.* Act of 1853, amendatory of the revenue law, construed in *Sanderson v. City of La Salle*, 441. See TAXATION, 1, 2, 3.

3. *Taxation to pay interest on the bonds of municipal corporations,* under act of April 16, 1869. *Dunnovan et al. v. Green*, 63. See TAXATION, 9, 10.

4. *Special assessments in the city of Aurora—not collectible out of personal property.* Construction of the general revenue law, the act of March 1, 1854, and the charter of the city of Aurora, in *Mix v. Ross et al.* 121. See SPECIAL ASSESSMENTS, 9 to 12.

5. *Right of way—under general incorporation law of 1859—mode of procedure—in whose name the petition shall be presented.* Act construed in *Skinner et al. v. Lake View Avenue Co.* 151. See RIGHT OF WAY, 1.

6. *Pleading and evidence in the action of replevin.* The 14th section of the Practice Act, (R. S. 1845) construed in *Constantine v. Foster*, 36. See PLEADING AND EVIDENCE, 10.

7. *Granting new trial—at what term.* The 24th section of the Practice Act (R. S. 1845) construed in *Constantine v. Foster*, 36. See NEW TRIALS, 2.

8. *Statute of Descents—posthumous heirs.* *Botsford v. O'Conner et al.* 72. See DESCENTS, 1.

9. *Attachment of boats and vessels.* Act of February 16, 1857, construed in *Barque "Great West No. 2" v. Oberndorf et al.* 168. See ATTACHMENT OF BOATS AND VESSELS, 1, 2.

10. *Consolidation of causes of action, in suits before justices of the peace.* The statute on that subject construed in *Lathrop v. Hayes*, 279. See JUSTICES OF THE PEACE, 1, 2, 3.

11. *Execution—whether it may issue after seven years.* The various statutes on that subject construed in *Stribling et al. v. Prettyman*, 371. See EXECUTION, 3.

12. *Highways—notice to owners to remove fences—extension of time by highway commissioners.* The statute construed in *Hall et al. v. The People ex rel. Rogers et al.* 307. See HIGHWAYS, 3.

13. *Highways—remedy to compel commissioners to open road.* Acts of 1861 and 1867 construed in the same case. See MANDAMUS, 3, 4.

STATUTES. *Continued.*

CONSTITUTIONALITY.

14. *Of act of April 16, 1869, authorising the levy of taxes to pay interest on the bonds of municipal corporations.* See CONSTITUTIONAL LAW, 1, 2.

STEPCHILDREN.

OF THEIR SUPPORT.

1. A step father is under no legal obligation to support his wife's children by a former marriage. *Attridge et al. v. Billings et al.* 489.

STIPULATION.

AS TO WHAT IS THE CAUSE OF ACTION.

1. *Its effect.* A declaration in assumpsit contained a special count on a sight draft, and two common counts. A stipulation that the contract embraced in the special count was the sole cause of action relied on, simply operated to limit the proof to that cause of action, but not to aid a defective plea. *Humphrey v. Phillips et al.* 132.

SUBROGATION.

WHO ENTITLED THERETO.

1. A mere stranger or volunteer can not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. But if the person who pays the debt, is compelled to pay, for the protection of his own interests and rights, then the substitution should be made. *Hough v. Aetna Life Ins. Co.* 318.

2. So, where a general agent of an insurance company had appointed a local agent, and taken a bond from him in the name of the company, with sureties, conditioned that the local agent should pay over all moneys received by him, and the general agent paid to the company certain premiums received by the local agent, but not accounted for by him, it was *held*, in a suit upon the bond thus given, in the name of the company, for the use of the general agent, that inasmuch as the latter had the appointment of the local agents, and was bound, not only by contract with the company, but in order to maintain his position, to pay over all moneys received through local agents, his settlement with the company of the amount of the default of the principal in the bond, before suit brought, did not operate to discharge the bond, but he had the right to be subrogated to the rights of the company in respect thereto. *Ibid.* 318.

SURETIES.

SURETIES ON GUARDIAN'S BOND.

1. *Extent of their liability.* The sureties upon the general bond of a guardian are liable for the rents of the lands of the ward leased by

SURETIES. SURETIES ON GUARDIAN'S BOND. *Continued.*

the guardian, notwithstanding the requirement of section 135 of the chapter of the Statute of Wills, that the guardian, before leasing such lands, shall execute a special bond, conditioned faithfully to apply the moneys to be raised therefrom to the benefit of the ward. The giving of the new bond required by that section of the statute can not be construed as a release from ultimate liability of the sureties on the general bond. *Wann et al. v. The People, use, etc.* 202.

2. So, where a guardian leased the lands of his ward, under an order of court authorizing the leasing, and also requiring him to execute a bond conditioned for the faithful application of the moneys thus to be raised, to the benefit of his ward, the order being made in pursuance of section 135 of the Chapter of Wills, but the guardian failed to give the bond, it was *held*, the sureties on the guardian's general bond were liable to the ward, the guardian failing to account, and being insolvent, for the proceeds of the leased premises. *Ibid.* 202.

NOTICE TO SURETIES.

3. *Of default on the part of the principal.* Where a general agent of an insurance company appointed a local agent, and took from him a bond in the name of the company, conditioned that the local agent should pay over all moneys received by him, it was *held*, the surety in the bond, and his principal, being equally and primarily liable to the obligee, no notice to the surety, of the defalcation of his principal, was necessary in order to fix the liability upon the bond. *Hough v. Aetna Life Ins. Co.* 318.

SURRENDER OF SECURITIES.

WHETHER NECESSARY.

1. A general agent of an insurance company appointed a local agent, taking a bond from him in the name of the company, conditioned that the local agent should pay over all moneys received by him. The general agent paid over to the company certain premiums received by the local agent, but not accounted for by him, whereupon the latter gave to the former his promissory notes for the amount of his defalcation: *Held*, in an action on the bond by the company, those notes should have been surrendered on the trial, or proof made that they had been given up, in order that a judgment could be properly entered. *Hough v. Aetna Life Ins. Co.* 318.

SWAMP AND OVERFLOWED LANDS.

SWAMP LAND COMMISSIONER.

1. *Of his powers.* A swamp land commissioner has no authority to declare a forfeiture of a contract respecting a sale of swamp lands belonging to a county,—that power rests alone, in counties under township organization, in the board of supervisors. *Dart v. Hercules et al.* 446.

2. *Purchaser from him must know his authority.* See AGENCY, 10.

TAXATION.

RETURN OF THE ASSESSMENT.

1. *Must be within the time prescribed.* An ordinance of the city of LaSalle, prescribing the manner of assessing property for taxation in the city, provided that the assessment should be completed and returned to the city clerk's office by a certain day, and thereupon the clerk should give notice that objections thereto would be heard by the city council on a day designated in the ordinance: *Held*, this requirement to return the assessment by a given day, was not simply directory to the assessor, but was mandatory, and its performance indispensable to the validity of the assessment. *Sanderson v. City of LaSalle*, 441.

2. So, upon an application for a judgment against certain delinquent lots in that city, for taxes, the objection that the assessment was not returned within the time prescribed in the ordinance, was fatal to the application. *Ibid.* 441.

3. *Effect of act of 1853, amendatory of the revenue law.* Nor did the act of 1853, which provided that the failure to return the assessment in time should not vitiate, cure the omission in this case, as that act had no relation to assessments for corporate purposes,—they are regulated by the revenue law of the municipality. *Ibid.* 441.

TAX TO BUILD A SCHOOL HOUSE.

4. *Can not be diverted to other purposes—rights of holders of orders on the treasurer.* Where directors of schools employed a person to build a school house, and they levy a tax to pay therefor, and issue orders to the contractor on the treasurer for his pay, and he sells the orders at par to raise money to construct the building, the purchasers have the right to look to the tax thus levied for payment. *Pennington et al. v. Cos et al.* 118.

5. School directors have the right to levy a special tax for school purposes without a vote, and a special tax for building purposes by a vote of the people; but they exceed their power when they attempt to appropriate the funds raised for a specific object to a different purpose. The holders of the orders had an equitable lien upon this fund, and the attempt to divert it to a purpose foreign to the express vote of the people, was a fraud and misapplication. *Ibid.* 118.

CORPORATE OR LOCAL TAXATION.

6. *Constitutional limitation of legislative powers—and herein, who are "corporate authorities."* The 5th sec. of art. 9 of the constitution of 1848, is a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any but the corporate or local authorities, and corporate authorities mean the municipal officers elected by the people to be taxed, or appointed in some mode to which such people have assented. *Gage et al. v. Graham et al.* 144.

TAXATION. *Continued.*

COOK COUNTY DRAINAGE COMMISSIONERS.

7. *Can not levy taxes, being a mere private corporation.* Where an act of the general assembly created a corporation and appointed officers called drainage commissioners, and authorized them to survey, locate, complete and alter ditches, embankments, culverts, bridges and roads, and to maintain and keep them in repair, and authorized such officers to assess the expense and cost of such improvements thereof on lands benefited thereby, and providing that when made in writing, specifying the amount imposed on each tract, and returned to the treasurer of the county, it shall be his warrant for the collection of the same: *Held*, that such an assessment is repugnant to the constitution. *Gage et al. v. Graham et al.* 144.

8. The officers making the levy are not elected or appointed with the assent of a municipal corporation, nor with the assent of the persons taxed or assessed. They were appointed by the legislature and organized into a private corporation, and are accountable to no other body or persons. Their power to assess is absolute, and they are not required to assess according to the benefits conferred—the owner is given no hearing on the assessment or appeal for its correction, and the law is unconstitutional. And on a sale under the assessment, a court of equity will grant relief by enjoining the collector from making a deed on such sale. *Ibid.* 144.

TO PAY INTEREST ON BONDS OF MUNICIPAL CORPORATIONS.

9. *Whether levy excessive—presumption.* Where it appears that the Auditor of Public Accounts has levied a larger sum than is necessary for the payment of the annual interest on bonds registered in his office, under a specified election, and there is no allegation that no other bonds of the town are so registered in the Auditor's office, the court will not presume the levy is excessive; that must be shown. *Dunnovan et al. v. Green*, 63.

10. *Whether authorized—when such bonds may properly be registered in the Auditor's office.* Under the 7th sec. of the act of 1869, it is unlawful to register bonds with the Auditor of State, until the railroad in aid of which they have been voted, shall be completed near or into the limits of the corporation, and cars are running thereon; and none of the benefits of the act can be claimed, unless the subscription or donation creating the corporate debt, was first submitted to an election of the legal voters within the corporation, under provisions of laws of the State, and a majority of the legal voters living therein were in favor of such aid, subscription or donation: *Held*, that where any of these requirements is wanting, the language of the act being imperative, the Auditor has no power to make the assessment of the tax, and the courts will enjoin its collection. *Ibid.* 63.

TAXATION.

TO PAY INTEREST ON BONDS OF MUNICIPAL CORPORATIONS. *Continued.*

11. *Constitutionality of the act of 1869, providing for such taxation, and whether it amounts to the giving of the State credit therefor.* See **CONSTITUTIONAL LAW.**

COMBINATION AT A TAX SALE.

- Chancery will restrain the issuing of a tax deed.* See **INJUNCTIONS, 4.**

TOWNSHIPS.

NEGLECT TO KEEP HIGHWAYS IN REPAIR.

- Whether liable to a private action.* See **HIGHWAYS, 9.**

TRESPASS.

WRONGFUL ENTRY INTO THE HOUSE OF ANOTHER.

1. *License in respect thereto.* Where, in an action of trespass *vi et armis*, it was sought to recover for the alleged wrongful entry by defendant into the plaintiff's house, an instruction asked by the defendant which directed the jury that, if they believed from the evidence, the defendant entered the plaintiff's house by her leave and license, or by the leave or license of any inmate thereof, such entry was not a trespass, was regarded as erroneous, in asserting that any inmate of the house could give a license to enter, whereas a mere stranger or trespasser might have been an inmate of the house, and the right to the enjoyment of home in quietness and free from intrusion does not permit its invasion on the license of a mere stranger or trespasser who may happen to be in the house. *Outler v. Smith, 252.*

2. Though it might be that such a license, acted on in good faith, would mitigate the damages for such an entry, yet it would not operate as a justification. *Ibid. 252.*

3. While there may have been no facts in the case calculated to mislead the jury, had such an instruction been given, still the defendant could not complain of the refusal to give it, the same not being legally accurate. *Ibid. 252.*

4. In order to constitute a license to enter the house of another, it is not necessary that express authority should be given; but if a person visit the house of another to see him on business, and is allowed to enter, or does enter without force, that would be deemed a license. *Ibid. 252.*

5. But the defendant being sued, not only for entering the house of the plaintiff with force, but for taking others with him, an instruction directing the jury that if defendant went to plaintiff's house on business, and was allowed to enter, or did enter without force, such would

TRESPASS.

WRONGFUL ENTRY INTO THE HOUSE OF ANOTHER. *Continued.*

be deemed a license, would be erroneous as tending to mislead the jury; for if the defendant was permitted to enter the house under an express or an implied license, that would not authorize him to take his assistants with him, and although he entered himself under a license, he might still have been guilty of a trespass, in forcing those aiding him into the house against the plaintiff's will,—the instruction relating only to his own entry. *Culler v. Smith*, 252.

6. A man has no authority to enter the house of another without permission, even to take his own property. *Ibid.* 252.

7. Even an officer, armed with a writ in a civil case, representing the majesty of the State, can not break into and enter a man's house to seize property. *Ibid.* 252.

8. A party wishing to recover property in the house of another, has his remedy by an action, and must pursue it unless he can gain access to the domicile of such person, either by express or implied assent. The home of every person is held by the law to be sacred, and it will not permit intrusion against the will of the owner. *Ibid.* 252.

FALSE IMPRISONMENT.

9. *Question of jurisdiction of the court awarding the process.* Where a court has jurisdiction to award process for the arrest and imprisonment of a party, neither he nor those who advise or execute his process, can be held liable for a trespass, although the proceedings may be irregular and erroneous. But if the magistrate did not have such jurisdiction, then he and those who advise and act with him, or execute his process, are trespassers. *Von Kettler et al. v. Johnson*, 109.

TROVER.

WHETHER THE ACTION WILL LIE.

1. A conversion is a positive, tortious act; mere *nonfeasance* or neglect of some legal duty will not suffice to support trover, although it may constitute sufficient ground to maintain an action on the case. *Sturges et al. v. Keith*, 451.

2. So, if a party be authorized by power of attorney to sell certain stocks, and the agent violate the instructions, or in any manner abuse his authority to the injury of his principal, his wrongful acts in that regard will not constitute a conversion so as to support an action of trover, but the remedy would be an action on the case for such abuse. *Ibid.* 451.

3. *Evidence in rebuttal as to conversion.* In an action of trover for an alleged conversion of property, proof that the defendant sold the property under a power of attorney would rebut the *prima facie* case made for the plaintiff by a demand and refusal. *Ibid.* 451.

TROVER. *Continued.*

OF THE DEMAND.

4. *Whether properly made of an agent.* If stocks be delivered to the agent of a banking firm, as a special deposit in their bank, and subsequently a portion of the members of the firm withdraw, the former agent of the firm will thereupon cease to be the agent of the retiring members, so that upon an action of trover being brought, after the dissolution, against all the original partners, for an alleged conversion of the stocks, a demand upon the agent will not afford *prima facie* evidence of conversion as against those who had previously withdrawn. *Sturges et al. v. Keith*, 451.

TRUSTS AND TRUSTEES.

WHAT CONSTITUTES A TRUSTEE.

1. A vendor of land executed a contract in writing, through his attorney in fact, for the conveyance thereof upon the payment of the purchase money at the times and in the manner therein specified. Subsequently, the purchaser, to secure a balance due upon the purchase money, assigned to such attorney in fact certain notes and mortgages, with "full power to settle, compromise or exchange the aforesaid mortgages and notes for other property or demands, taking part of the amount due in lieu of a larger part or the whole as he should think best in his judgment, and to cancel and discharge such mortgages from the record for such consideration as he might think proper," and to pay the proceeds to the vendor in satisfaction of his claim, and the residue to such assignor, the purchaser, or his heirs or assigns: *Held*, the assignee of those notes and mortgages held them and the proceeds of them as a trustee for the assignor, and subject to all the duties and restrictions properly incident to that relation. *Ogden v. Larrabee, Adm'r*, 389.

TRUSTEE BUYING AT HIS OWN SALE.

2. Upon foreclosure of one of the mortgages so held by the trustee, in his name as the assignee, it was *held*, that by reason of his relation to the fund, he could not properly become a purchaser in his own right under the decree. *Ibid.* 389.

3. The rule that a trustee can not rightfully become a purchaser at his own sale, and hold to his own use, applies as well where the sale is made under a decree of court as when made by himself. *Ibid.* 389.

4. *Pledgor and pledgee.* The broad powers given to the assignee of the notes and mortgages, to "settle, compromise, or otherwise sell, arrange or dispose" of them, did not operate to create the relation of pledgor and pledgee between him and his assignor. But even if that relation had existed, the law would not have conferred upon the pledgee any greater privileges or imposed less liabilities in dealing

TRUSTS AND TRUSTEES.

TRUSTEE BUYING AT HIS OWN SALE. *Continued.*

with the pledge, than in case of a trustee dealing with the trust fund—so that in either case he could not purchase for his own use, at a sale had by virtue of that relation. *Ogden v. Larrabee, Adm'r*, 389.

5. *Trustee held to his bid.* Where, upon foreclosure of a mortgage, a trustee of the fund to which the mortgage belonged, through his attorney, bid off the land at the master's sale, in his own name, and attempted to hold it to his own use, it was *held*, upon bill filed by the *cestui que trust* to charge the trustee in respect to the subject matter of the sale, that although the attorney exceeded his authority in bidding for the property more than it was worth, yet the trustee, by subsequently accepting the master's deed, with knowledge of those facts, would be regarded as having ratified the act of his attorney, and be held to his election to take the purchase at his bid. *Ibid.* 389.

6. *Where trustee buys at his own sale, by whom chargeable and to what extent.* While the trustee is forbidden to purchase at a sale under a decree of foreclosure of a mortgage belonging to the trust fund, yet if he does so become the purchaser, the sale is not for that reason void, but merely voidable, at the election of the *cestui que trust*. The sale would still operate to complete the foreclosure as against the mortgagor, but the purchaser would hold the property subject to all the conditions of the trust the same as he held the mortgage itself. *Ibid.* 389.

7. Where a trustee of any kind buys property, directly or indirectly, of which he is the trustee, the *cestui que trust* may, at his option, without reference to the fact whether it was to his interest or not, and without proof that he is damnified, or even inquiring into that question, have the sale set aside, and have the property re-exposed to sale, or he may elect to have the sale affirmed at the bid of the purchaser, or, where the property has been subsequently sold by the trustee to a third party, to have the value of the property or the amount realized from the sale. *Ibid.* 389.

8. Where a trustee improperly purchased at his own sales under decrees of foreclosure, the biddings being upon distinct parcels of land, and at different times, and afterwards sold the several parcels, some at less than his bid, and others at a considerable advance, it was *held*, in fixing the rule of accountability of the trustee to the *cestui que trust*, the latter may elect to take the amount bid by the trustee in the one case, and the amount realized by him on his subsequent sale in the other. *Ibid.* 389.

INTEREST—OF ANNUAL RESTS.

9. *Where trustee uses the trust fund.* The rule seems to be, that in all cases where the trustee has used the trust fund, and it appears he has realized large gains and profits to himself, and has failed to keep

TRUSTS AND TRUSTEES. INTEREST—OF ANNUAL RESTS. *Continued.*

any exact account of the same, or has refused to render an account to the beneficiary, the law will require him, in order that complete justice may be done, to account for the original fund so used, with interest computed with annual rests. *Ogden v. Larrabee, Adm'r*, 389.

SALE BY AN AGENT.

10. *Who may question it.* Notwithstanding an agent appointed by a trustee, with a power to sell the trust property, can not legally sell it in the absence of the trustee, still, a person holding simply the legal title, without having any equitable interest whatever in the trust property, can not in equity question such a sale. *Beach v. Shaw*, 17.

USURY.**WHAT CONSTITUTES USURY.**

1. In this case, a loan for \$5000, was negotiated, and a note given to the lender for the amount, with ten per cent interest, the money not being paid to the borrower at the time, however, but the lender gave him a letter of credit authorizing the borrower to draw on him for the sum mentioned in the note whenever it should be made satisfactorily to appear that the security offered was sufficient. The borrower received only \$4500 of the amount, and it was understood he was to receive no more, the deficiency being represented by a draft drawn by the borrower and delivered to the lender at the time the note was given, and which was never paid. The transaction was held to be usurious, the draft mentioned having been given to cover its real character. *Hewitt et al. v. Dement et al.* 500.

2. A purchaser of land being unable to meet his payments promptly, executed to his vendor a new note, payable in gold coin, or in United States treasury notes with a premium to be added equal to the difference between the value of gold and treasury notes, on a certain day, which was largely more than the rate of interest allowed by law. The original contract was payable in treasury notes: *Held*, the new note was usurious, as it gave to the vendor more than the legal rate of interest. *Gates et al. v. Hackethal*, 534.

PRINCIPLE ON WHICH ALLOWED AS A DEFENSE.

3. Usurious transactions, from the actual or presumed disparity of condition between the parties, the borrower being generally controlled by a necessity which places him measurably within the power of the lender, have ever formed an exception to the general rule that parties shall be deemed *in pari delicto*, when they intentionally participate in the violation of law, the borrower being regarded as under such constraint of circumstances, such moral duress, as to take from him the character of *particeps criminis*. *Hewitt et al. v. Dement et al.* 500.

MUST BE SPECIALLY PLEADED. See **PLEADING AND EVIDENCE**, 15.

VARIANCE.

ALLEGATIONS AND PROOFS. See **PLEADING AND EVIDENCE.**

VENDOR AND PURCHASER.**DECLARATION OF FORFEITURE BY VENDOR.**

1. *When not allowable.* Although a contract for the sale of land reserves the right to declare it forfeited, and the right to retain the money already paid on the purchase in case the vendee fails to make prompt payment as the several installments of the purchase money fall due, still the vendor can not declare such a forfeiture where the land thus sold is incumbered, and he is unable to perform his part of the contract, by conveying a clear and perfect title according to the agreement. *Wallace v. McLaughlin*, 53.

2. Where the vendor has the reserved power of declaring a forfeiture, he can not do so, unless he is in a position, at the time, to compel a specific performance of the agreement. *Ibid.* 53.

DEFAULT IN PAYMENT.

3. *As a bar to equitable relief.* Upon bill filed by a purchaser of land, to restrain a vendor from recovering land sold, and to be conveyed free from incumbrance, into the possession of which the purchaser had entered under the agreement, such relief will not be barred by his failure to make payments, by reason of the incumbrance on the land. *Ibid.* 53.

4. *Misrepresentations by vendor, as to title.* Where a vendor falsely represents that his title is good and free from incumbrance, and thus induces the purchaser to forego an examination of the title, and the purchaser enters and makes payments and large improvements on the land before he learns of the incumbrances, and then refuses to make further payments on the purchase until the incumbrances are removed, he can not be held to be in default in making payments. *Ibid.* 53.

FORFEITURE OF CONTRACT AND PURCHASE MONEY.

5. A contract for the sale of land provided that in case the purchase money should not be promptly paid, the vendor might at his option declare the contract at an end, and in that event, whatever money might have been paid upon the purchase should be absolutely forfeited to the vendor. Several payments were made, and at the request of the vendee, one half the land was conveyed to a third party, the vendee in the original contract receiving the entire purchase money therefor. Subsequently, the original vendor declared the contract forfeited for non-payment of the balance of the purchase money. Afterwards the vendee died, and the vendor obtained an allowance against his estate for the entire unpaid balance due on the whole tract sold, having sold and conveyed the remaining half of the land to other parties. On bill

VENDOR AND PURCHASER.

FORFEITURE OF CONTRACT AND PURCHASE MONEY. *Continued.*

filed by the representatives of the vendee to adjust the equities between the parties, it was *held*, that while the vendor was not entitled to the allowance for all the purchase money remaining unpaid on the whole tract at the time he declared the forfeiture, yet he was entitled to compensation for the half of the land conveyed on the request of the vendee; and in adjusting the different payments made, which were upon the whole tract, and not upon either half specifically, it was held one half the money paid should be applied on that part of the land conveyed at the instance of the vendee, and the other half to be embraced in the forfeiture. *Ogden v. Larrabee, Adm'r, 889.*

OF AN INCUMBRANCE.

6. *Condemnation for right of way.* If the owner of a tract of land sells it, giving a contract for a deed of general warranty to be made on final payment, and between the sale and the making of the deed a portion of the premises is condemned under the right of eminent domain for a railway track, the incumbrance thus created is not one for which damages can be recovered in an action on the covenants in the deed. *Stevenson et al. v. Loehr, 509.*

7. Though in case the damages to the land by reason of such condemnation are paid by the railway company to the vendor, and he fails or refuses to account therefor to the vendee, the latter would probably have his option between an action for the damages as money had and received to his use, or an action on the covenants in his deed. The vendor in such case holds the damages in trust for the vendee, to be accounted for when the purchase money is paid. *Ibid. 509.*

8. If the damages are paid in special benefits to the land, the vendee is regarded as having received, in that manner, the consideration for the condemned portion. *Ibid. 509.*

9. While the damages to the land belong, in equity, to the purchaser, yet, when paid in money, if the security of the vendor would be impaired by the receipt of the same by the purchaser, he might insist they should not be paid until his security be increased to that extent, and the purchaser would have a corresponding right to security if about to be placed in jeopardy by the payment of the damages to the vendor. *Ibid. 509.*

PAROL AGREEMENT TO RESCIND.

Statute of frauds—rights of the parties. See CONTRACTS, 8, 9, 10.

WHAT CONSTITUTES A RESCISSION.

As between vendor and purchaser. See CONTRACTS, 4.

PURCHASE MONEY.

Not recoverable after rescission. See PURCHASE MONEY, 1.

SPECIFIC PERFORMANCE.

Whether it may be enforced, and upon what terms. See CHANCERY.

VERDICT.**IN SEVERAL SUITS CONSOLIDATED.**

1. *A single verdict.* Where two suits between the same parties are consolidated into one, it is not error in the jury, trying the consolidated suit, to render but one verdict, and if it had been, still the objection was waived by failing to make any objection to it in the court below. *Miller et al. v. McManis*, 126.

VOID AND VOIDABLE.**TRUSTEE BUYING AT HIS OWN SALE.**

Sale not void, but only voidable. See **TRUSTS AND TRUSTEES.**

OF A DECREE PRO CONFESSO.

Upon insufficient allegations. See **CHANCERY.**

WAIVER.**WAIVER OF FRAUD.**

By subsequent action, with knowledge. See **FRAUD.**

WIDOW.**RIGHT TO OCCUPY THE HOME PLACE.**

1. Where a party died while the owner of a "claim" or "improvement" upon the public lands, and upon which he resided with his family at the time of his death, and his widow became his administratrix, it was *held*, that within the spirit of the statute which provides that the widow may, in all cases, retain the full possession of the dwelling house in which her husband most usually dwelt next before his death, together with the outhouses and plantation thereto belonging, free from molestation and rent, until her dower be assigned, the administratrix was guilty of no breach of duty in occupying this claim as a home, instead of selling it. *Attridge et al. v. Billings et al.* 489.

WITNESS.**IMPEACHMENT.**

1. A party can not impeach a witness called by himself, by proving that he had made contrary statements out of court. *Griffin v. City of Chicago*, 317.

CREDIBILITY.

2. *Of witnesses when in the employment of the party for whom they are called.* The mere fact that witnesses are in the employment of the party for whom they are called, will not justify the jury in discrediting them to the extent of rejecting their testimony entirely. *Murray et al. v. McLean, Adm'r*, 378.

